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APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
TERM OCTOBER 1994

ROBERT C. DOWNER, PETITIONER

VS.

ELDON HANNEMAN AND PATRICIA HANNEMAN, HUSBAND AND WIFE
AND
MAXINE V. SWENSON, RESPONDENTS

APPENDIX A	A-1
APPENDIX B	A-25
APPENDIX C	A-51
APPENDIX D	A-83

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133pp

IN THE SUPREME COURT OF THE STATE OF NEVADA

ELDON HANNEMAN AND PATRICIA HANNEMAN, HUSBAND AND WIFE,	)	No. 23434
Appellants,	)	
v.	)	
ROBERT C. DOWNER, MAXINE V. SWENSON, AND STODDARD JACOBSEN,	)	
Respondents.	)	
ROBERT C. DOWNER,	}	
Cross-Appellant	}	
v.	}	
ELDON HANNEMAN AND PATRICIA HANNEMAN, HUSBAND AND WIFE; ROBERT G. DOWNER; AND STODDARD JACOBSEN,	}	
Cross-Respondents.	}	

Appeal and cross-appeals from money judgment entered pursuant to bench trial. Ninth Judicial District Court, Douglas County; Michael E. Fondi, Judge.

Affirmed in part; reversed and remanded in part.

Jack McAuliffe, Reno
for Eldon and Patricia Hanneman.

Jon M. Yaple,
Carson City,
for Robert C. Downer.

Aebi & McCarthy,
Carson City,
for Maxine V. Swenson.

Allison, MacKenzie, Hartman, Soumbeniotis & Russell and Mike Pavlakis, Carson City,
for Stoddard Jacobsen.

O P I N I O N

PER CURIAM:

FACTS

This action results from a negligently performed survey and subsequent conveyance of the inaccurately described real property. The subject property is part of a tract of land located in the Pinenut Range of Douglas County. Respondent Stoddard Jacobsen acquired the tract in 1950. In 1965, Jacobsen retained respondent, Robert Downer, to prepare a survey map and record it in the official records of Douglas County. Downer prepared the survey with the understanding that the tract would be subdivided into several parcels. Prior to commencing the survey, Downer obtained plats,

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1 A "corner" is a point determined by the surveying process, which sets or establishes the boundaries of a subdivision. A "monument" is a physical object that marks the corner point. Types of monuments include a marked wooden stake or post, a marked stone, an iron post with an inscribed cap, a marked tree, or a rock with an "x" at the exact corner point. "Accessories" are part of corner monuments and consist of bearing trees or objects, mounds of stone and pits dug in the sod or soil, that aid in identifying the corner position. Bureau of Land Management, U.S. Dept. of Interior, Technical Bulletin 6, Manual of Instructions for the Survey of the Public Lands of the United States, Ch. V, **S** 5-4, p. 129. "Field notes" are the written record of the survey that "identifies and describes the lines and corners of the survey and the procedures by which they were established." ID. at Ch. VIII, **S** 8.1, p. 183.

The property at issue ("the property") is shown on the Downer map as consisting of 5.88 acres; it is one of the parcels created by Jacobsen's subdivision. In late 1966 or early 1967, Jacobsen conveyed the property to Frank Frazier. However, the conveyance from Jacobsen to Frazier was never officially memorialized because Frazier was illiterate. In 1971, Frazier sold the property to respondent Maxine Swenson for $9,500.00. At Frazier's request, Jacobsen deeded the property directly to Swenson by a grant, bargain and sale deed.

In 1976, Swenson sold the property to the appellants, Eldon and Patricia Hanneman, for $35,000.00.[2] The Hannemans gave Swenson $7,500.00 and executed a promissory note for $27,5000.00, to be paid in monthly installments of $200.00. Both Swenson and the Hannemans believed that the property consisted of 5.88 acres, upon which was situated a dilapidated and uninhabitable house. The well on the property was inoperative, the water pipes were broken, the access road was nearly inaccessible, the flat roof on the old house leaked, and the kitchen and bathroom were in shambles.

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2 The Hannemans were divorced in 1976 and unless otherwise stated, "Hanneman" refers to Eldon Hanneman.

Hanneman, a carpenter by trade, repaired the well, water pipes, and road, constructed a gable roof, installed custom-built kitchen cabinets, and made sundry repairs to the kitchen and bathroom.. He also installed new siding, two windows, a sliding window door, a wood stove, light fixtures, and a concrete patio.

In 1981, Hanneman learned that a private survey performed by Veta Grande Mines revealed that over four acres of the property (including the house and well) belonged to the federal government. Hanneman contacted Swenson and informed her of the defective survey performed by Downer. Swenson defended Downer's survey, but rejected Hanneman's offer to continue paying for the property on condition that Swenson agree to reimburse him if Downer's survey proved to be incorrect.

Hanneman stopped making payments in April of 1982.[3] Hanneman continued to occupy the premises on a sporadic basis until the autumn of 1985, when he abandoned the property entirely. In an effort to mitigate his damages, Hanneman removed the kitchen cabinets, bathroom vanity, light fixtures, wood stove, washer

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3 Hanneman initially deposited the monthly payments into a bank account; however, Hanneman withdrew the funds in 1988 and used them to purchase his current residence.

and dryer, and other items of personal property. In leaving the premises, Hanneman made no provision for protecting the property against vandalism or the elements. During trial, Odd Kjell "Kelly" Larsen, a carpenter called by Swenson, testified that it would cost over $12,000,00 to repair the damage caused by Hanneman's mitigation. Swenson eventually foreclosed upon the property and now owns the remaining 1.5 acres, which are narrow, steep and valued at $1,000.00.

The Hannemans filed the underlying action on July 31, 1984, in which they asserted claims against Swenson for misrepresentation, breach of the sales agreement, and breach of warranty of title. The Hannemans also complained against Jacobsen for negligence and breach of warranty of title, and alleged negligence against Downer. The action sought $120,000.00 in damages, consisting of the market value of the property on the date of the complaint, and attorney's fees.

Swenson counterclaimed against the Hannemans for breach of the promissory note. Swenson also filed cross-claims against Jacobsen and Downer seeking indemnification for breach of warranty of title and a negligent property survey, respectively. Finally, Jacobsen cross-claimed against Downer for indemnification based upon the negligent survey.

At the close of the Hannemans' case-in-chief, Jacobsen moved for an NRCP 41(b) dismissal on grounds that: (1) no privity existed between the Hannemans and Jacobsen or between Swenson and Jacobsen to support a breach of warranty of title claim; (2) Hannemans had failed to present evidence of Jacobsen's negligence; and (3) Jacobsen was not liable for Downer's negligence, if any, because Downer was an independent contractor. The district court granted the motion and dismissed Jacobsen from the case.

At the conclusion of the bench trial, the district court found that Swenson had contracted to sell the Hannemans 5.88 acres, and that Swenson's "inability to convey 5.88 acres was a breach of that contract due to a failure of consideration." Accordingly, the district court ordered Swenson to pay the Hannemans' out-of-pocket costs of $7,500.00. Swenson's liability to the Hannemans, however, was offset by her judgment against Downer for $7,500.00, with interest, which the district court specifically designated as the amount of "Swenson's liability to the Hannemans." The court found that Downer negligently performed the survey and ordered him to pay Swenson the unpaid balance of the promissory note from the Hannemans ($26,019.48 minus the $1,000 value of the remaining land). Finally, the district

court ordered Downer to pay attorney's fees to the Hannemans and to Swenson in the amount of $10,000.00 each, together with taxable costs.

DISCUSSION

The parties have raised several issues on appeal, only the following of which need resolution. The Hannemans imputes error to the district court's calculation of damages and its decision to dismiss Jacobsen's from the action. Swenson contends on cross-appeal that the court erred when it awarded damages to the Hannemans and failed to award Swenson damages for breach of contract. Finally, Downer insists that the district court erred in finding that he negligently performed the property survey and that his liability extends to subsequent purchasers of the affected property.

1. The Hannemans' Damages

Under the peculiar facts of this case, where Swenson purported to sell land which she mistakenly thought she owned, the district court correctly determined that the measure of the Hannemans' damages would be the amount of their "out-of-pocket" loss sustained by the Hannemans. See *Hornwood v. Smith's Food King* No. 1, 107 Nev. 80,84, 807 P.2d 208, 211 (1991). "Out-of-pocket" damages are measured by the difference between the amount paid by the aggrieved

party and the actual value of that which was received. *Randono v. Turk*, 86 Nev. 123, 130, 466 P. 2d 218, 223 (1970).

The Hannemans were dispossessed of property concerning which they had expended approximately $53,000.00.[4] Nevertheless, the district court limited the Hannemans' damages to $7,500.00, based on findings that the Hannemans had "failed to mitigate their damages" when they abandoned the property, and that the monthly mortgage payments were "completely offset by the reasonable rental value they received in occupying the property."

As a general rule, a party cannot recover damages for losses that a reasonable effort could have avoided. *Conner v. Southern Nevada Paving*, 103 Nev. 353, 355, 741 P.2d 800, 801 (1987). Our review of the record compels us to conclude that the district court clearly erred in finding that the Hannemans did not make a reasonable effort to mitigate their losses. The Hannemans removed virtually every item of value they

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4 In addition to the $7,500.00 down payment, the Hannemans paid Swenson $200.00 per month for approximately seven years, paid all taxes and insurance on the property for approximately eleven years, and purchased approximately $15,000.00 of building materials. Moreover, the Hannemans spent in excess of 2,000 hours improving the property. Hannemans conservatively valued his time at $10.00 per hour (he was then making between $15.00 and $18.00 per hour as a carpenter).

had placed on the property that was reasonably removable, and deducted the value thereof from their damages. As a result, the damages were mitigated by approximately $8,000.00. Given the circumstances of this case, the Hannemans could have done little else by way of mitigation.

Moreover, the district court's reliance upon Mr. Kjell's testimony was misplaced. The cost of restoring the house after the removal of items by the Hannemans represented an irrelevant consideration by Swenson since she had no ownership interest in the house from which the salvaged items had been taken. Hanneman's mitigative actions were beneficial to Swenson, and thus could not serve to further reduce Swenson's liability to the Hannemans.

Ordinarily, a fair rental value of the property would be a proper offset against payments in effectually applied to the purchase price of the property during its occupancy by the putative purchaser. In this instance, however, we have determined that such an offset is unwarranted. The Hannemans agreed to purchase property that included a house that was uninhabitable. They lived and worked on the property under conditions that were substantially less than desirable. The Hannemans not only made the road to the property usable, they

worked in excess of 2,000 hours in an effort to restore the premises to a habitable condition.

Although we have concluded that the Hannemans must receive as damages, an award for the time and materials expensed on the property, they will not be compensated for the period of time they had to endure living conditions that would not have induced them on to the property as renters. As buyers, they executed and made payments under a promissory note that was to result in their eventual ownership of 5.88 acres. The Hannemans relied upon their contract with Swenson and invested approximately $53,000.00 into what they thought would be their permanent home. There is no evidence in the record that would support the proposition that the Hannemans, as temporary renters, would have invested the same amount of time and money in the dilapidated and uninhabitable house at issue. Swenson's breach of the contract to convey 5.88 acres deprived the Hannemans of the opportunity to purchase and make habitable a home in which they would build an equity and enjoy the pride of ownership. Thus, we conclude that the district court clearly erred when it calculated the amount of the Hannemans' "out-of-pocket" damages. *Hermann Trust v. Varco-Pruden Buildings*, 105 Nev. 564, 566, 796 P. 2d 590, 591-92 (1990). The Hannemans are

entitled to the total amount of their investment, less the amount of their mitigation, together with interest from July 22, 1976. Therefore, we affirm Swenson's liability to the Hannemans, but direct the district court, upon remand, to recalculate the actual "out-of-pocket" damages suffered by the Hannemans. The amount of Swenson's $7,500.00 judgement against Downer must also be increased accordingly.

2. The Court's Decision to Dismiss Jacobsen

The Hannemans also contend that the district court erred in dismissing their action against Jacobsen. The contention is based upon Jacobsen's alleged vicarious liability for Downer's negligent survey under the doctrine of respondent superior. However, the doctrine does not apply where, as here, there is no relationship of "superior and subordinate, or, as it is generally expressed, of master and servant, in which the latter is subject to the control of the former. The responsibility is placed where the power exists." *Wells, Inc. v. Shoemake*, 64 Nev. 57, 64, 177 P. 2d 451, 455 (1947).

Downer was an independent contractor over whom Jacobsen exercised no control. Moreover, the precision and expertise with which surveyors must perform their work does not lend itself to control by laypersons. As one author noted:

> The surveyor is isolated in his calling and therein lies his responsibility . . Dishonesty in ordinary business life cannot long be hid and errors in account quickly come to light, but the false or faulty survey may pass unchallenged through the years, for few but a surveyor himself are qualified to judge it.

Walter G. Robillard and Lane J. Bouman, Clark on Surveying and Boundaries **S** 2.04, p. 30 (6th ed. 1992) (quoting A.C. Mulford, Boundaries and Landmarks 88, 89 (1912)). Additionally, NRS 625.330 (3) makes it unlawful for a surveyor to sign, stamp or seal any plat, map, report or document relating to land surveying which the surveyor himself did not prepare or for which he did not have "responsible charge of the work."

For the reasons stated above, we affirm the district court's finding that Downer acted as an independent contractor whose negligence cannot be imputed on Jacobsen. The action against Jacobsen was properly dismissed by the district court.

3. The Doctrine of Merger

Swenson challenges the district court's finding that her failure to convey 5.88 acres of land to the Hannemans was a breach of contract. Swenson argues that no legal or factual bases exist to support the

court's finding because no written contract for the sale of real property was introduced at trial. Swenson cites NRS 111.210, the statute of frauds respecting real property, to support her argument. That section provides in relevant part:

> 1. Every contract . . .for the sale of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made.

NRS 11.210 (1).

Swenson's reliance upon the foregoing statute is misplaced. The statute of frauds does not require the existence of a formal written contract to validate a loan sale transaction as long as some "note or memorandum" memorializing the transaction exists. See *Ray Motor Lodge v. Shartz*, 80 Nev. 114, 119, 390 P. 2d 42,44 (1964) (stating that separate writings considered together may satisfy statute of frauds even if neither is a sufficient memorandum in itself).

In the instant case, the district court concluded that the property description in the sales listing, "together with the surrounding circumstances of the land sale transaction, created a contract for

the sale of 5.88 acres." The legal description contained in the grant, bargain and sale deed refers to the Record of Survey which Downer filed in 1966 and which shows Parcel H (the subject parcel) as consisting of 5.88 acres. Additionally, the promissory note between Swenson and the Hannemans corroborates the sale of 5.88 acres. These writings, when considered together, satisfy the statute of frauds and evidence a contract for the sale of the subject property.

Swenson further argues that even if a contract did exist, its terms merged into the deed as matter of law. She contends, therefore, that under the doctrine of merger, any obligations she owed to the Hannemans derived solely from the deed. Since the property was conveyed to the Hannemans by grant, bargain and sale deed, Swenson claims to have warranted only that she had not conveyed the same real property to another and that the property was fee from encumbrances.[5] Swenson also insists that if, after

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5 NRS 111.170 states, in relevant part:

1. The words "grant, bargain and sell" in all conveyances made after December 2, 1861, in and by which any estate of inheritance or fee simple is to be passed, shall, unless restrained by express terms contained in such conveyances, be construed to be the following express covenants, and none other, on the part of the grantor, for himself and his heirs to the grantee, his heirs, and assigns:

> (a) That previous to the time of the execution of the conveyance the grantor has not conveyed the same real property, or any right, title, or interest therein, to any person other than the grantee.
>
> (b) That the real property is, at the time of the execution of the conveyance, free from encumbrances, done, made or suffered by the grantor, or any person claiming under him.

delivery and acceptance of a deed containing no express or implied warranties contained in the grant, bargain and sale deed, and that the Hannemans failed to plead either fraud or rescission in any event.

Swenson's argument is overly simplistic and fails to take into account the exceptions to which the doctrine of merger by deed is subject. The merger by deed doctrine has been described as follows:

> The general rule concerning a contract made to convey the property is that once a deed has been executed and delivered, the contract becomes merged into the deed, because it has accomplished the purpose for which it was created. The terms in the deed which follows the contract of sale become the sole memorial of the agreement which was once contained in the contract of sale. This does not mean that a contract no longer exists, just that the deed controls as the contract, rather than the terms of the prior sales contract.

Clark v. Cypress Shores Develop. Co., 516 So. 2d 622, 626 (Ala. 1987) (citations omitted; emphasis added). Stated differently, when the terms of the

deed cover the same subject matter as the earlier contract and the two are at variance, the deed controls. *Dobrusky v. Isbell*, 740 P. 2d 1325, 1326 (Utah 1987). Whether merger is applicable "depends upon the intention of the parties, and intention in 237, 239, 645 P.2d 967, 968 (1982) (stating that parties' intentions are determined from all the circumstances surrounding the transaction). Such cases is a question of fact to be determined by an examination of the instruments and from the facts and circumstances surrounding their execution." *Webb v. Graham*, 510 P.2d 1195, 1197 (Kan. 1973); see also *Szabo v. Superior Court*, 148 Cal. Rptr. 837, 840 (Cal. Ct. App. 1978) ("courts have looked to the intention of the parties to determine whether or not the deed was intended as the complete and final embodiment of the agreement"); *Kartheiser v. Hawkins*, 98 Nev. 237, 239, 645 P.2d 967, 968 (1982) (stating that parties' intentions are determined from all the circumstances surrounding the transaction).

Consonant with the foregoing authorities, Swenson's attempt to avoid her contractual obligations to the Hannemans by resort to the doctrine of merger by deed is without merit for several reasons. First, although a grant, bargain and sale deed contains only two express warranties, the Swenson deed

expressly conveyed to the Hannemans the land "shown on Parcel 'H' on the certain Record of Survey recorded November 25, 1966, as File No. 34665, Official Records of Douglas County, Nevada." As indicated previously, the Record of Survey shows that Parcel "H" contains 5.88 acres. Second, the terms of the deed and contract are not at variance. The deed and the documents that compose the contract all purport to convey 5.88 acres to the Hannemans. Finally the record reflects that the Hannemans expected to receive, and Swenson intended to convey, 5.88 acres of land, upon which was situated a "fixer-upper" house. In deed, Swenson admitted that she believed she was selling the Hannemans 5.88 acres and that no one would have paid $35,000.00 for only 1.5 acres.

For the reasons noted above, we conclude that the district court correctly determined that Swenson breached her agreement to convey 5.88 acres to the Hannemans.

4. Downer's Negligence

Downer contends that his actions did not fall below the standard of care for licensed surveyors because he made the proper assumptions when reaching his conclusions concerning the location of the northern boundary of Jacobsen's property. In

particular, Downer claims that field notes are presumptively correct until rebutted by a preponderance of the evidence and, therefore, he was required to assume that the calls and distances contained in the field notes were accurately measured and recorded. In contrast, the district court heard expert testimony that Downer was not entitled to rely upon the calls and distances in the field notes once he located the monuments and, if he could not locate a monument, he was required to reset the monument by a double proportionate measurement.

We conclude that substantial evidence supports the district court's determination that Downer failed to meet the requisite presented at trial, we have previously recognized that the location of monuments prevails over calls and distances:

> The trial court thus fully recognized, as a matter of law, that the original monument evidencing the corner common to sections 16, 17, 20 and 21, if found and identified or, if destroyed obliterated, if its location could be fixed), would control the situation irrespective of the field notes and, undoubtedly, irrespective of the testimony of the defendants' witnesses hereinafter referred to.

Backer v. Gowen, 73 Nev. 34, 39, 307 P.2d 765,768 (1957).[6]

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6 We also noted in Backer that the trial court's conclusion

Moreover, the district court expressly disbelieved Downer's testimony and relied instead upon the testimony of Neil Forsythe, a cadastral surveyor for the BLM, who indicated that the standard of care requires a surveyor to establish the four corners of a given section by identifying the locating of the original survey monuments. Downer contends that Forsythe was not qualified to render an opinion as to the standard of care because he is not a licensed surveyor in Nevada. Downer's contention lacks merit for two reasons: First, a person need not be licensed to qualify as an expert; rather, the witness must simply possess "special knowledge, skill, experience,
training or education" relating to the subject matter. NRS 50.275. Forsythe, a BLM surveyor for over thirty-five years, was qualified to testify on the subject of surveying methods. Second, employees of the federal government who have been authorized under federal law to conduct surveys need not be licensed unless they are performing private surveys within the state. NRS 625.490(4).[7]

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7 NRS 625.490(4) provides:

1. Any state, county, city or district employee directly responsible to a professional land surveyor.

2. Any subordinate to a professional land surveyor of this state, insofar as he acts as a subordinate.

3. Registered professional mining engineers engaged solely in surveys made for mining and milling purposes or facilities pertaining thereto.

The district court is better suited to rule on the qualifications of persons presented as expert witnesses and we will not substitute our evaluation of a witness's credentials for that of the district court absent a showing of clear error. The district court did not err in allowing Forsythe to testify as an expert.

5. Downer's Duty to Subsequent Purchasers

Downer contends that he owed no duty to subsequent purchasers of the subject property. We disagree. Surveyors may be held liable for the damages that result from their mistakes, misrepresentations, or negligence. See generally Dag E. Ytreberg, Annotation, Surveyor's Liability for Mistake in, or Misrepresentation as to Accuracy of, Survey of Real Property, 35 A.L.R. 3d 504 (1971). Lack of contractual privity between the parties is not a defense in an action for tortious negligence. Long v. Flanigan Warehouse Co., 70 Nev. 241, 245, 382 P.2d 399, 402 (1963) (the absence of contractual privity is not a defense to tort liability). A surveyor's duty has been held to extend to subsequent purchasers who relied upon the survey to their detriment. Rosney v. Marnul, 250 N.E.2d 656 (Ill. 1969); Cook Copnsultants, Inc. v. Larson, 700 S.W. 2d 231 (Tex. Ct. App. 1985). Downer fully understood that his survey

would affect future purchasers of the divided Jacobsen tract.

We conclude, consistent with the authorities cited above, that Downer indeed had a duty to the Hannemans as foreseeable subsequent purchaser of the property, and that Downer breached that duty, thereby causing damage to the Hannemans. Unfortunately, the district court properly found that Downer's negligence was the actual and legal cause of the Hannemans' damages, yet inexplicably assessed damages only against Swenson. This was error. Upon remand, the district court shall enter judgment for the amount of Hannemans' recalculated damages against both Swenson and Downer, jointly and severally. Of course, the modified judgment must again provide that Swenson may recover over against Downer any and all sums the Hannemans recover from Swenson.

Finally, Downer invokes the statute of limitations as a bar to the Hannemans' claims against him. Downer's references to NRS 11.203, 11.204 and 11.205 are misplaced. These three statutes all apply to actions related to an aspect of construction that eventuates in damage to the plaintiff. Our legislature has not enacted a specific period of limitations for surveyors, and therefore the "catch-all" statute, NRS 11.220, applies.[8] The Hannemans

were placed on notice that they may have had a cause of actin against Downer in 1981. The complaint against Downer was filed by the Hannemans in 1984, well within the four-year period of limitations specified under NRS 11.220. Therefore, Downer's attempt to avoid liability based upon the expiration of the period of limitations is meritless.

We have reviewed the remaining issues not heretofore discussed and have determined that they are without merit and need not be addressed.

CONCLUSION

For reasons discussed above, we reverse the inadequate award of damages to the Hannemans, and remand to the district court with instructions to

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8 NRS 11.220 entitled "Actions for relief not otherwise provided for" provides: "an action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued."

In *Woods v. Lable Investment Corp.*, 107 Nev. 419, 812 P. 2d 1293 (1991), the parties were involved in a boundary problem that resulted in an encroachment on an adjacent lot. Although a surveyor was not sued, in the course of the decision we stated that "NRS 11.190 provides a six-year limitation period for contract actions and a two-year limitation on tort actions." The reference to a two-year period of limitation for tort actions was overbroad, as 11.190 (4) (d) (the two-year provision) applies only to personal injury and wrongful death actions. NRS 11.190 (3) (d) provides a three-year period of limitation for fraud which, of course, is a tort. Moreover, we have expressly held that NRS 11.220 (the so-called "catch -all" statute) "is the applicable statute for suits concerning tortious damage to real property." *Oak Grove Inv. v. Bell & Gossett Co.*, 99 Nev. 616, 621, 668 P.2d 1075, 1078 (1983). To the extent that our statement in Woods may be construed to apply to tort actions other than those for personal injury or wrongful death, it is hereby disapproved. Tort actions, such as the instant action, that are not expressly addressed by a specific statute of limitations are subject to the four-year period of limitations provided under NRS 11.220, the catch-all statute.

recalculate and increase the damage award to the Hannemans consistent with the views expressed in this opinion. The district court is also directed to enter judgment against Downer for the full amount Hannemans' damages so that Swenson and Down are jointly and severally liable for Hannemans' total damages. The district court shall also provide judgment in favor of Swenson against Downer for any and all sums that the Hannemans may recover against Swenson in satisfaction or partial satisfaction of their judgment. The judgment entered below is affirmed in all other respects.

_____, C.J.
Rose

_____, J.
Steffen

_____, J.
Young

_____, J.
Springer

Case No. 15029

Dept. No. 1

IN THE NINTH JUDICIAL DISTRICT COURT OF THE OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

-oOo-

ELDON HANNEMAN and PATRICIA HANNEMAN, husband and wife,

Plaintiffs,

vs.

MAXINE V. SWENSON; ROBERT DOWNER, dba DOWNER ENGINEERING; STODDARD JACOBSEN, et al.,

Defendants.

_____/

FINDINGS OF FACT, CONCLUSIONSOF LAW AND JUDGMENT

AND RELATED CROSS-CLAIMS

_____/

THIS MATTER came before the Court for a bench trial on November 18, 19, 20, 21, and 22, 1991, in Douglas County, Nevada. The Plaintiffs, (hereinafter referred to as the "HANNEMANS"), appeared in person

and were represented by JACK MCAULIFFE, ESQ.; Defendant MAXINE SWENSON, (hereinafter referred to as "SWENSON"), appeared in person and was represented by JOHN AEBI, ESQ.; Defendant ROBERT C. DOWNER, (hereinafter referred to as "DOWNER"), appeared in person and was represented by JON YAPLE, ESQ.; and Defendant STODDARD JACOBSEN, (hereinafter referred to as "JACOBSEN"), appeared in person and was represented by MICHAEL PAVLAKIS, ESQ. The Court heard testimony from seven witnesses and admitted 50 exhibits into evidence. This judgment is based on an evaluation of that testimony, a review of the exhibits entered into evidence, and a review of the pleadings and arguments on file with the Court or presented by counsel at trial.

Set out below is a discussion of the factual and procedural background behind this dispute and a summary of the proceedings at trial. Plaintiffs filed their complaint in this action on July 31, 1984. The trial of this matter was continued several times, over a period of five years, to allow DOWNER and JACOBSEN to pursue administrative remedies with the United States Bureau of Land Management, (hereinafter referred to as the "BLM"), and to attempt to avoid duplicative litigation in the event that the administrative process provided a remedy obviating the need for this trial. An understanding of that

process is necessary, and a discussion of the process is included, in order to completely understand the background of the current state law claims. In addition, an understanding of what occurred at trial is necessary to give full consideration to all of the parties' theories and arguments.

It is not within this Court's jurisdiction to establish any of the land boundaries which are in dispute because of ownership claims thereto by the BLM and Bureau of Indian Affairs, nor is it within this Court's jurisdiction to modify or affect any of the findings made previously by the BLM. However, the factual and procedural background recited below, and the synopsis of the trial proceedings, shall, for the purposes of this judgment, be integrated with and considered part of this Court's findings of fact and conclusions of law.

A. FACTS

On November 25, 1966, DOWNER recorded a survey map depicting land owned by JACOBSEN located within Section 9, Township 11 North, Range 21 East, Mount Diablo Base and Meridian, bordering a stretch of U.S. Route 395 in Douglas County, Nevada. By that map, DOWNER purportedly identified the boundaries of a piece of land owned by JACOBSEN. DOWNER purported to subdivide the land into seven parcels with their boundaries as indicated on his survey map.

In 1966 or 1967, JACOBSEN traded what he thought was 5.88 acres of land, indicated as parcel "H" on the DOWNER survey map, to Frank Frazier, a well driller, in return for services Frazier had provided to him. Because Frazier was illiterate, no deed was ever recorded to memorialize the transfer.

In 1972, Frazier sold parcel "H" to SWENSON, (who was then known as MAXINE KRIDLER). To facilitate that sale, JACOBSEN executed a grant, bargain and sale deed conveying his interest in parcel "H" to SWENSON.

In 1976, with the assistance of a realtor, SWENSON sold parcel "H" to the HANNEMANS. Pursuant to escrow, on June 22, 1976, SWENSON executed a grant, bargain and sale deed conveying her interest in parcel "H" to the HANNEMANS. In return, the HANNEMANS agreed, by way of a promissory note dated June 20, 1976, to pay $35,000 for the property: $7,500 down, with a principal balance of $27,000 bearing interest at 8% per annum, payable in monthly principal and interest installments of $200 per month on the note until April 22, 1982.

By letter dated July 28, 1981, Richard Harris, Esq., an attorney for an adjacent landowner, the Veta Grande Mining Company, notified the HANNEMANS that another private surveyor, J. D. (Jim) Jones, had prepared a record of survey for Veta Grande

which differed substantially from the DOWNER survey map. According to the Jones survey, the boundary between Sections 4 and 9 of Township 11 North, Range 21 East, Mount Diablo Base and Meridian, was substantially farther south than indicated on DOWNER's map. The Jones survey established a boundary between Sections 4 and 9, (that Section line is also the northern boundary of parcel "H"), which diminished the HANNEMAN holding dramatically. According to the Jones survey, the house, garage and well all encroach on land owned either by the Bureau of Land Management or by the Bureau of Indian Affairs.

As a result of the dispute which developed because of the discrepancies between the DOWNER and Jones surveys, DOWNER contacted the BLM to protest the Jones survey. At the behest of the BLM, Robert A. Pratt, a cadastral surveyor, under the direction of Neil Forsythe, performed a dependent resurvey of Sections 4 and 9 of Township 11 North, Range 21 East, Mount Diablo Base and Meridian between April 19, 1982 and January 5, 1983. The results of his survey also differed substantially from the DOWNER survey--most significantly with respect to the location of the boundary dividing Sections 4 and 9--such that only 1.54 acres of the intended 5.88 acres in parcel "H" actually remained.

On March 23, 1983, DOWNER and JACOBSEN filed a

formal protest of the dependent resurvey, specifically disputing the locations of the quarter corners common to Sections 4 and 9, the quarter corners common to Sections 4 and 5, and the corner common to Sections 4, 5, 8 and 9.

By order dated July 5, 1984, Ed Spang, the State Director of the BLM, dismissed the DOWNER/ JACOBSEN protest without a hearing. Director Spang stated that it was his opinion that DOWNER had not presented clear and convincing evidence proving that the BLM resurvey was not an accurate retracement and reestablishment of the lines of the original survey conducted by T. K. Stewart and G. W. Conkling in 1881.

DOWNER and JACOBSEN appealed from the dismissal, and on March 22, 1985, Administrative Law Judge (ALJ) Mullen of the United States Department of Interior, Office of Hearings and Appeals, Interior Board of Land Appeals, (IBLA), set aside the dismissal and ordered a hearing on the protest before ALJ L. K. Luoma.

ALJ Luoma conducted a hearing on June 19, 20, and 21, 1985, in Reno, and on June 25, 1985 in Minden. In his written opinion, ALJ Luoma held that "because there appear to be so many deviations from the original calls and distances in BLM's resurvey as to cast doubt

on its accuracy..., I see no alternative but to remand the case to the BLM for resurvey." *Stoddard Jacobsen v. Bureau of Land Management*, IBLA 84-762 (September 27, 1985) (ROA 218, 230). ALJ Luoma remarked that he felt that several of the boundary locations, as depicted by DOWNER, more accurately reflected the original survey descriptions than did depictions by the BLM. ALJ luoma was not convinced, however, that the evidence fully supported DOWNER's depiction of the boundary between Sections 4 and 9. ALJ Luoma held that the monuments relied upon by the BLM had not been proven "beyond a reasonable doubt." He also concluded that a theory held by DOWNER--that the original surveyors fraudulently established "double corners"--was not supported by the evidence proffered.

The BLM, and DOWNER and JACOBSEN, appealed from ALJ Luoma's decision. The BLM wanted further guidance on how to conduct the resurvey and on the correct standard of proof necessary to establish the location of the original survey monuments, and DOWNER and JACOBSEN contended that the resurvey was appropriate, but that the BLM should be instructed to use the monuments and honor calls determined by DOWNER as the ones conforming most reasonably to the calls and distances recorded in the original notes and plat. On May 8, 1987, in *Stoddard Jacobsen v. Bureau of*

Land Management, 97 IBLA 182 (1987), the IBLA affirmed ALJ Luoma's opinion that the BLM should conduct a resurvey. The Board noted its doubt as to some of the evidence presented below by DOWNER and JACOBSEN, (notably the 1/4 corner common to Sections 4 and 9). The Board also noted, however, that DOWNER and JACOBSEN's evidence generally supported the accuracy of their theory about the 1881 survey, while the evidence of discrepancies presented by the BLM almost supported the case for a fraudulent survey, despite the BLM position to the contrary. Consequently, the Board confirmed ALJ Luoma's order for a resurvey, giving the BLM the latitude to conduct either a dependent or an independent resurvey.

In *Stoddard Jacobsen v. Bureau of Land Management*, 103 IBLA 83 (1988), on Petition for Reconsideration by the BLM, the Board reversed itself again, in part. Although it affirmed the validity of the 1982 survey, the Board held that in its previous decision, "a new evidentiary standard was improperly set forth therein for determining whether a corner is existent." Id. at 46. The Board held that the proper standard for the BLM to apply to establish the monuments for use in a resurvey was to consider a corner existent (or found) if such a conclusion was supported by substantial evidence. The Board then applied the substantial evidence

standard to the BLM resurvey evidence, and decided that the BLM had established all the survey monuments, but expressed concern over the angle of deflection created along the 4/9 Section line by the placement of the corner common to Sections 3, 4, 9 and 10. Consequently, the Board directed the BLM to perform a double proportionate resurvey of the property to reduce the angle of deflection produced by placement, in 1982, of the corner common to Sections 3, 4, 9, and 10. Effectively, the ruling affirmed the 1982 survey except as to the placement of that corner.

On July 20, 1988, Downer filed a Motion for Reconsideration, and the IBLA Board ruled that its decision was administratively final.

On August 1, 1988, during the resurvey to reduce the angle of deflection along the boundary between Sections 4 and 9, the BLM survey team found what the BLM now considers to be the original monument marking the corner common to Sections 3, 4, 9 and 10.

On September 8, 1988, the IBLA Board amended its order in light of the "found" corner to obviate the need for a double proportionate resurvey.

DOWNER, alone, appealed to the United States District Court for the District of Nevada, complaining that his survey was still the most accurate depiction of the boundaries established by the original survey. Judge Edward C. Reed dismissed DOWNER's appeal on

October 10, 1989, citing Downer's lack of standing to complain about the IBLA actions.

DOWNER's appeal of Judge Reed's decision is currently pending before the Ninth Circuit Court of Appeals.

At the commencement of trial, the Court noted that ROBERT G. DOWNER had been dismissed from the case, and that although there was no Answer on file on behalf of ROBERT C. DOWNER, the parties had proceeded as though he had filed a general denial of all claims and cross-claims against him.

The plaintiffs first called Neil Forsythe, a cadastral surveyor for the BLM, who testified about the various surveys conducted on the land in and around Section 9, Township 11 North, Range 21 East, Mount Diablo Base and Meridian. Forsythe has worked for some 30 years as a cadastral surveyor for the BLM.

He testified as to the standard of care for surveyors in Nevada, both before and after the time of the DOWNER survey, as set forth in two editions of the Manual of Surveying Instructions, made binding on Nevada surveyors by Chapter 625 of the Nevada Revised Statutes. Forsythe then compared and contrasted the method utilized by DOWNER with the method required by the Manual of Surveying, and the methods utilized during the BLM dependent resurvey

in 1982-83. Forsythe introduced an exhibit which graphically demonstrated the difference between DOWNER's original survey, subsequent surveys DOWNER performed in an attempt to bolster his argument before the BLM, and the BLM resurveys.

Forsythe testified that the standard of care is to establish, by identifying the location of the original survey monuments, the four corners of a given section, then to subdivide the section into quarters, and then to subdivide each quarter into sixteenths and so on until a rectangle of land containing the target possession can be tied to known monuments. According to Forsythe, DOWNER only positively identified one corner in his original survey--the southeast corner of Section 9--and that he utilized that corner as the major point of reference which he relied upon, together with the calls and distances from the Stewart and Conkling survey notes, to tie into JACOBSEN's land.

In essence, Forsythe testified that the major reason DOWNER's survey varied from all other surveys, and fell below the standard of care, was because of the method DOWNER used to "tie" into and establish the boundaries of JACOBSEN's land, which method was premised on two major assumptions DOWNER necessarily made about the accuracy of the Stewart and Conkling survey--(1) that the calls and distances in the Stewart

and Conkling survey were accurately measured and recorded; and, (2) that Section 9 contains exactly six hundred and forty acres.

Forsythe felt that DOWNER's primary assumption that the original survey calls and distances were accurate, and controlling, was by itself a major mistake which was compounded by his further assumption that Section 9 contains six hundred and forty acres. He maintained that DOWNER's dogmatic insistence on reasoning from the calls and distances in the Stewart and Conkling survey without also establishing the location of the original corners inevitably led to an inaccurate survey. Forsythe illustrated how, in order for DOWNER to establish boundaries which would circumscribe an area of 640 acres within a rectangle corresponding to the 1881 calls and distances, DOWNER had to "adjust" the 4/9 Section line northward from the line actually established by the original surveyors.

According to Forsythe, one of the major reasons the survey manual requires that surveyors locate the position of the original monuments marking corners, (and the reason that monuments control over calls and distances), is to avoid precisely the kind of problem DOWNER encountered. He said that the original surveyors frequently did not run survey lines to establish accurate calls and distances between all

of the monuments in a given area like Section 9, and that such was especially the case in a "rural" section. (It was Forsythe's opinion that surveyors in the late nineteenth century only ran all of the section boundaries in and around towns where the calls and distances between monuments would be carefully scrutinized.) He testified that it would have been physically impossible for Stewart and Conkling to survey the entire 84 miles in and around section 9 within the six days actually devoted to the survey in that area, and their calls and distances must therefore have been estimates. Further, in over thirty-five years with the BLM, Forsythe has never found a section which actually contains six hundred and forty acres. Forsythe surmised that DOWNER had to shift the northern boundary of section 9 north of the Stewart and Conkling boundary to be consistent with the calls and distances recorded in the original survey while at the same time establishing an area within Section 9 encompassing six hundred and forty acres. (Forsythe testified that he has actually age dated blazed trees which are positioned around the BLM location of the corner common to Sections 4, 5, 8, and 9 to the date of the Stewart and Conkling survey, and that is one reason why he is sure of the BLM's location of the northern boundary of Section 9.)

It was Forsythe's opinion that DOWNER did not meet the standard of care for surveyors in Nevada, and that his survey did not fall within acceptable margins of error. Forsythe stated that he is absolutely sure that the north and east boundaries of Section 9, as established by DOWNER, are incorrect.

Steven R. Johnson, MAI, testified for the Plaintiffs regarding the value of the property and improvements. Johnson testified that his appraisal of the home, garage and a land area of 5.88 acres would be $67,000--$35,000 for the land and $32,000 for the improvements. He testified that his appraisal for the improvements was based on his assumption that the house would be repaired to a habitable condition, first, and that the property would actually be marketable. On cross, he acknowledged that the "comparable" properties used for comparison were all habitable, and that each of those properties had a fair market value substantially in excess of the target, and he further admitted that at the time of his inspection in April of 1990 the house was uninhabitable and most of the fixtures had been removed. He agreed that the cost to repair the residence and garage would be a reasonable deduction from his appraisal of the value of the improvements to the land. He also confirmed that none of the trees, bushes and shrubs planted by HANNEMAN were

still alive in 1990. Finally, Johnson testified that a 1.54 acre sliver of land, the remainder of SWENSON's holding after the BLM survey, would be worth, at most, $1,000.

ELDON HANNEMAN testified, on his own behalf, that he and his wife purchased parcel "H" from SWENSON on the terms and conditions outlined above. He testified that he learned about the property through a realtor, and purchased it as a "fixer-upper." Over the years, he labored many hours, (in excess of 2,000 hours as specified in Plaintiff's Exhibit "R"), to make the home and garage habitable and useable, and installed fixtures and utilized materials for improvements with an actual cost of $15,145. (Plaintiff's Exhibits "1" and "P"). He testified that he made payments to SWENSON of $200 per month, principal and interest, from the date of purchase in 1976 until April 22, 1982, when he learned of the boundary dispute. He said he continued to occupy the property, without paying rent, from April 22, 1982 until late 1985. He originally deposited the monthly mortgage payments in an interest bearing account, for the benefit of SWENSON, until the controversy over the land could be settled. But, after he finally left the property in the fall of 1985 because he felt he was trespassing on government land, he used the money from the "trust" account as

a down payment on the purchase of a new home in Fernley in October of 1988. He further testified that when he departed, he took many of the fixtures and improvements with him. (Plaintiff's Exhibit "1") He acknowledged that neither SWENSON nor the BLM ever demanded that he leave the property.

JACOBSEN testified as an adverse witness for the HANNEMANS. JACOBSEN testified that he hired DOWNER to perform a survey in order to subdivide some of his property. He testified that he traded the property indicated as parcel "H" on the DOWNER survey map to Frank Frazier, a well driller, in return for services Frazier had provided to him. He testified that no deed was ever recorded memorializing the transaction because Frazier was illiterate. He testified that he joined DOWNER's protest of the BLM resurvey at DOWNER's request and because he believed that DOWNER's survey was, and is, the correct survey.

The HANNEMANS rested, and JACOBSEN moved for an involuntary dismissal, with prejudice, of the HANNEMANS' Complaint and SWENSON'S Cross-Claim against him, pursuant to NRCP 41(b). The Court granted JACOBSEN's motion with regard to the HANNEMANS' Complaint against him, noting that no evidence was presented establishing any contract between the HANNEMANS and JACOBSEN; no evidence was presented that JACOBSEN was in any way negligent for hiring

DOWNER or relying on DOWNER's survey; and no evidence was presented showing that JACOBSEN made any express representations sufficient to create a warranty of title. The Court noted that none of the parties could present evidence overcoming the authority cited by JACOBSEN in 6A *Powell on Real Property* (1991), Paragraph 898 [1] [b], page 81A-46, which instructs that a metes and bounds description in a grant, bargain and sale deed does not create an express representation or warranty that the property described therein is actually possessed by the grantor. Further, at the time JACOBSEN transferred the property, there were not any liens or encumbrances on the property, nor had JACOBSEN transferred the property to anyone else. Thus, the warranties implied by NRS 11.170 were not breached.

The Court reserved ruling on JACOBSEN's NRCP 41(b) Motion regarding SWENSON's Cross-Claim until after the presentation of SWENSON's case-in-chief.

SWENSON's case consisted of two witnesses: Odd ("Kelly") Larsen, and SWENSON herself. Larsen testified as to the repairs needed to make the home on parcel "H" habitable, and to the cost of repairs necessary on the garage. Plaintiff's Exhibit "Y" is a bid for repairs, prepared for SWENSON by Larsen, estimating $15,008.60 would be necessary to return the house and garage to habitability. Larsen testified

that repairs are necessary because of the way in which fixtures were removed, because of the kind of fixtures which were removed, and because the property has apparently been vandalized since HANNEMAN departed.

SWENSON testified on her own behalf. She confirmed that she sold the property to the HANNEMANS under the terms cited, that a realtor, Tom Gardner, facilitated the sale by listing the property as 5.88 acres with a house, garage and well, and that the transaction was handled through an escrow. She also testified that although JACOBSEN executed the deed transferring the property to her, she paid the $9,500 purchase price for the land to Frazier. SWENSON confirmed that she forclosed on the property in 1988 when the HANNEMANS stopped paying the property taxes and insurance on the home.

After SWENSON rested, JACOBSEN renewed his NRCP 41(b) motion. During argument on that motion, counsel for SWENSON acknowledged that he could find no authority supporting the proposition that the metes and bounds description in the grant, bargain and sale deed between JACOBSEN and SWENSON constituted a contract.

This Court granted JACOBSEN's motion and dismissed JACOBSEN from the case.

DOWNER then presented his case-in-chief, which

consisted solely of his own testimony. DOWNER related that as of the time of trial he was 81 years old, and had been involved with surveying in various capacities for approximately 60 years. After lengthy testimony regarding his education and experience, DOWNER requested that the Court qualify him as an expert witness on his own behalf. The Court denied his motion, commenting that it would be inappropriate to give DOWNER's own, self-serving, testimony more weight than appropriate by specifically qualifying him as an expert.

DOWNER defended his survey by first commenting that the method described by Forsythe would have been financially unworkable in he context of such a small subdivision. According to DOWNER, the usual practice of most surveyors presented with a similar task is to follow the method he used so that their surveys are conducted in an economical manner.

Next, DOWNER recited a number of factors which led him to reject the northern boundary of Section 9, and, in particular, the northwest corner of Section 9. DOWNER felt, based on work performed for his original survey in 1965 and on many hours of work performed subsequently, that Stewart and Conkling placed double corners along the northern boundary of Section 9, and throughout Township 11. He later acknowledged, however, that at least three other

surveyors who have surveyed the property since 1965 have accepted the monument he rejected as the northwest corner of Section 9 during one of his later surveys.

Nonetheless, DOWNER unequivocally stated that he was comfortable in 1965 with is location of the northern boundary of Section 9 and he has not changed his opinion since. In fact, DOWNER said that the work he has done on this problem since 1965 has led him to believe that the northern boundary of Section 9 should actually be thirty feet north of where he placed it in 1965.

On cross, DOWNER admitted that he also never located, in 1965, the northeast corner of Section 9, but that he established the northern boundary of Section 9 anyway. He also admitted that he never found a monument along the chop line which he believes marks the section line. DOWNER reiterated that the only monument he physically located in 1965 was the southeast corner of Section 9.

After DOWNER rested, the parties argued their respective positions.

The HANNEMANS argued that DOWNER did not meet the standard of care for a licensed surveyor, and that he was therefore negligent. They argued that his duty of care extended to the public as a whole because subdivided land is foreseeably going to be sold to innumerable parties yet to be determined at

the time of the survey. The HANNEMANS assert that their damages should be measured by either one of two standards: benefit of the bargain, or out of pocket expenses. They relied on the appraisal by Johnson, ($67,000), to establish what the benefit of their bargain would have been; or, alternatively, said that their damages are the sum of Mr. HANNEMAN's labor, material costs, monthly mortgage payments until he moved off the property, and their $7,500 down payment--a total of $53,004.65.

SWENSON concurred with the HANNEMANS insofar as DOWNER's negligence was concerned, and also argued for a judgment against the HANNEMANS for non-payment on the promissory note. SWENSON asserted that her damages are $26,019.48, (minus the $1,000 value of the remaining sliver of land), plus interest on the unpaid balance at 8%, plus attorneys fees of $10,000. SWENSON argued that the HANNEMANS failed to mitigate their damages, and that there is no legal basis to recover the cost of improvements--and especially that Mr. HANNEMANS' labor is not a compensable item. SWENSON felt that the reasonable rental value of the property, ($22,000 for the 111 months they occupied the property), should be deducted from any award against her. SWENSON closed with her theory that the grant, bargain and sale deed does not supply any evidence of a contract for the sale of 5.88 acres to

the HANNEMANS.

DOWNER closed by imploring the Court to render an opinion declaring that what the BLM has done is wrong and that the BLM is responsible for an American tragedy. DOWNER argued that his actions must be evaluated on the basis of the information available to him in 1965, and that Forsythe was compelled to support a lousy survey in order to avoid dealing with his own mistakes. He believed that he has proved that the BLM survey is wrong, and that the Court must necessarily conclude that he was not negligent.

B. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. SWENSON contracted to sell 5.88 acres of land to the HANNEMANS.

a. The property description contained in the listing SWENSON utilized to sell the property to the HANNEMANS, together with the surrounding circumstances of the land sale transaction, created a contract for the sale of 5.88 acres, specifically, and SWENSON's inability to convey 5.88 acres was a breach of that contract due to a failure of consideration.

2. The value of the land remaining after the BLM administrative findings is $1,000.00, and the mortgage payments and improvements made by the HANNEMANS are not compensable.

a. The Court specifically dismisses the appraisal of the value of the property and improvements made by Stephen R. Johnson. Mr. Johnson's appraisal was based on his evaluation of "comparable" properties which were all marketable, habitable, and significantly more valuable than the property which is the subject of this lawsuit. He admitted himself that his appraisal was based on the assumption that the house was located on 5.88 acres of marketable land. Johnson did not provide any evidence of the value of an uninhabitable house located on government land. His only testimony regarding the actual state of affairs was that the 1.54 acres remaining would be worth, at most, $1,000.

b. Not only is there no legal basis for the HANNEMANS to recover the value of the improvements they made, the HANNEMANS failed to mitigate their own damages. Although ELDON HANNEMAN claims that he left slightly more than $12,000 worth of fixtures and improvements behind when he vacated the property, and that the labor he invested in improving the land and home should be compensated, there was ample testimony that the products of his labor and the value of the improvements left were largely destroyed because of the way in which he finally vacated the property. In fact, Odd Kelly submitted a bid to

make the repairs necessary to return the home to habitability totaling $12,898.21.

c. The monthly mortgage payments the HANNEMANS made to SWENSON between 1976 and 1982 are completely offset by the reasonable rental value they received by occupying the property during that period.

3. DOWNER acted unreasonably, and he negligently performed the survey he recorded in 1966.

a. DOWNER's behavior on the stand was deliberately evasive and non-responsive to the questions asked of him, and, as a result, he was not a credible witness. It is abundantly clear from the evidence presented that DOWNER failed to act reasonably when performing his survey in 1965, and that his actions since that time have been singularly designed to shore up his position after the fact. Plaintiff's Exhibit D is the most graphic illustration of DOWNER's failure to meet the standard of care. Every one of his own surveys since 1965 differs from the previous one, and every one of his surveys establishes boundaries in Section 9 which are different from the BLM survey. As Forsythe pointed out, DOWNER's method and assumptions inevitably led, and continue to lead to inconsistent and unreliable results. Without first establishing the monuments marking the boundaries of Section 9, particularly

when monuments control over calls and distances, DOWNER is doomed to continue to propagate the wrong boundaries. The Court does not believe that DOWNER intentionally established the wrong boundaries, but he has been singularly unwilling to admit even the possibility of error on his own part, and that has compounded the gravity of his poor survey results.

b. DOWNER owed a duty of care of JACOBSEN, SWENSON and the HANNEMANS, (as the ultimate purchasers of the property subdivided by DOWNER), when he performed his original survey in 1965. DOWNER breached that duty by failing to meet the standard of care applicable to surveyors in Nevada, and his breach of that duty was the cause in fact and proximate cause of the damages incurred by SWENSON and the HANNEMANS.

C. JUDGMENT

1. The Court finds in favor of the HANNEMANS and against SWENSON in the amount of $7,500.00, plus interest since July 22, 1976. That amount represents the HANNEMANS' compensable out of pocket expenses incurred as a result of SWENSON's failure to convey 5.88 acres of land.

2. The Court finds in favor of SWENSON and against DOWNER in the amount of $7,500, plus interest since April 22, 1976 which represents SWENSON's liability to the HANNEMANS.

The Court also finds in favor of SWENSON as

against DOWNER in an amount equal to SWENSON's loss on the balance of the note due after April 22, 1982, ($25,019.48--$26,019.48 as reflected on Plaintiff's Exhibit "S" minus the $1,000.00 value of the remaining land), plus interest at 8% since that date, which represents her loss on the sale to the HANNEMAN's occasioned by DOWNER's negligent survey.

3. The Court awards Hanneman and Swenson their taxable costs against DOWNER, and reasonable attorney's fees of $10,000 to the HANNEMANS against DOWNER and $10,000 to the SWENSONS against DOWNER.

IT IS SO ORDERED.

DATED this 27th day of March, 1992.

/s/ Michael

E. Fondi

DISTRICT

JUDGE

CC: Counsel of record

IN THE SUPREME COURT OF THE STATE OF NEVADA

ELDON HANNEMAN and PATRICIA HANNEMAN, HUSBAND and WIFE

Appellants,

vs

ROBERT C. DOWNER, MAXINE V. SWENSON, and STODDARD JACOBSEN,

Respondents.

/

No. 23434

ROBERT C. DOWNER,

Cross-Appellant,

vs.

ELDON HANNEMAN and PATRICIA HANNEMAN, HUSBAND and WIFE; MAXINE V. SWENSON; STODDARD JACOBSEN,

Cross-Respondents.

/

MAXINE V. SWENSON,

Cross-Appellant,

vs.

ELDON HANNEMAN and PATRICIA HANNEMAN, HUSBAND and WIFE; ROBERT C. DOWNER; and STODDARD JACOBSEN,

Cross-Respondents.

/

CROSS-APPELLANT/RESPONDENT/CROSS-RESPONDENT

ROBERT C. DOWNER'S REPLY BRIEF

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TABLE OF CONTENTS

PAGE

I. The Standard Of Care, As Set Forth By Appellants Hanneman, Is Erroneous.....1

II. Downer's Credibility.....2

III. Downer Followed The Proper Procedure.....3

IV. Double Proportionment Was Not An Available Alternative In 1965.....9

V. The Trial Court's Ruling Is Based On Physical Impossibilities.....10

VI. The Northwest Corner Of 4.....12

VII. The Highway Survey.....13

VIII. Plaintiff's Exhibit D Cannot Be Relied Upon By The Court Below.....14

IX. The Statutes.....15

X. Measure of Damages.....20

XI. Duty to Purchasers.....20

XII. Conclusion.....22

TABLE OF AUTHORITIES

CASES **PAGES**

Alaska United Gold Mining Co. v. Cincinnati-Alaska Mining Co., 45 L.D. 330, 3(1916).....8

Backer v. Gowen
73d Nev. 34, 307 P.2d 765(1967).....1

Cragin v. Powell (128 U.S. 691,696).....8
Jacobsen and Downer v. BLM 97 IBLA 182.....4, 5, 7, 9, 10 11, 12, 13, 14, 22

Lucy v. First National Bank
73 Nev. 64, 307 P.2d 774, at 67..... 2

Matese v. Bottom
73 Nev. 236, at 239, Head Note 2, 316 P.2d 929..... 2

McKay v. City of Las Vegas, 106 N 203.....15

Weggen v. Elenn-Parker Elec. Co.
(SD Iowa) 510 F Supp 252..... 21

STATUTES

Nevada Revised Statute 625.340.....15

TREATISES

57A Am Jur 2d, Negligence, §86.....21
57A Am Jur 2d, Negligence, §87.....21
57 Am Jur 2d, Negligence, §89.....22
57 Am Jur 2d, Negligence §122.....21

Manual of Survey Instructions (1947).....2, 3, 5, 9
§353.....3, 5, 6
§354.....6,10
§355.....9
§359.....18
§562.....8, 16, 18, 19

Manual of Survey Instructions (1973).....5, 10

IN THE SUPREME COURT OF THE STATE OF NEVADA

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SWENSON, and STODDARD JACOBSEN,
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ROBERT C. DOWNER; and STODDARD
JACOBSEN,
Cross-Respondents.

_____/

No. 23434

I.

THE STANDARD OF CARE, AS SET FORTH BY APPELLANTS HANNEMAN, IS ERRONEOUS

At page 11 of Appellant Hannemans' Reply Brief, Backer v. Gowen, 73d Nev. 34, 307 P.2d 765 (1967) is cited for the proposition that, at the trial court level, the standard for re-establishing a boundary is substantial evidence. The use of this standard at the trial court level is incorrect. The standard quoted in that case is an appellate standard:

> "The question involved is almost entirely a factual one and we have concluded that there is substantial evidence in the record to support the trial court's rejection of the plaintiff's contentions that the evidence compelled an acceptance of a point fixed in the center line of the highway as the discovered original government corner and original government monument evidencing the same fixed by the original government survey of 1881."

See Matese v. Bottom, 73 Nev. 236, at 239, Head Note 2, 316 P.2d 929, which is a contract case. See also Lucy v. First National Bank, 73 Nev. 64, 307 P.2d 774, at 67, which is a personal injury case. Thus the Hannemans are incorrect when they state that "the announced standard in this state, since 1957 at least, in reestablishing a boundary, is substantial evidence."

II.

DOWNER'S CREDIBILITY

As set forth in Hannemans' Reply Brief page 6, the Court below found that Downer was not a credible witness. The Court came to this conclusion because of an erroneous assumption concerning the methodology for determining the location of monuments. An understanding of the procedures set forth in the Manual of Survey Instructions (1947), (hereinafter 47 Manual, is critical to the evaluation of Downer's actions. His responses throughout the trial are directly parallel to the standards set forth in the 47 Manual. Fortunately, the facts in this case do not depend on Downer's credibility. Downer's position is absolutely supported by facts that are either uncontroverted, set forth in the 47 Manual, or have been previously decided by a preponderance of the evidence by the Federal Administrative Tribunal. These facts are set forth in Downer's opening brief and in the remainder of this brief.

III.

DOWNER FOLLOWED THE PROPER PROCEDURE

Downer's conduct must be measured against the procedures set forth in the 47 Manual. Both Downer and Forsythe (the Hannemans' "expert") indicated the 47 Manual controls the methodology of a survey (ROA V4, p847 L22-p848 L7, p66; ROA V7, p536).

The Court below, on page 20 of its Finding of Fact and Conclusions of Law and Judgment, stated:

> "As Forsythe pointed out, DOWNER's method and assumptions inevitably led, and continue to lead to inconsistent and unreliable results. Without first establishing the monuments marking the boundaries of Section 9, particularly when monuments control over calls and distances, DOWNER is doomed to continue to propagate the wrong boundaries."

Downer followed the procedure as set forth in the 47 Manual for "establishing the monuments." The procedure is as follows:

> "353. If the evidence of the monument is not fully conclusive, the engineer's attention will be directed at once to the record accessories; this step is so generally necessary that it should be considered simultaneously with the search for the monument; in fact, in their broader significance the accessories are a part of the monument.
>
> The underlying principles relating to the identification of the corner accessories, subject to the changes which may be expected in the period intervening after the date of the original survey, have already been fully outlined in chapter IV. It will suffice to state that the evidence of the accessories should agree with the record contained in the field notes of the original survey, subject only to such changes as reasonably may be expected." (Emphasis added)

Forsythe does not follow this above standard.

"Q. Now, isn't it true that the evidence to be

accepted should agree with the record in the field notes? A. No." ROA V4, p77.

The Administrative Tribunal at 97 IBLA at 219 makes the observation that, "the ability to discount the mass of evidence which tends to disprove BLM's placement of the various corners is not unique to BLM..."

From the Trial Court's decision, it appears that any pile of rocks, when found, becomes a corner. As shown above through the excerpt of the 47 Manual this is not the case. When a surveyor comes upon a pile of rocks that may be a monument, he is to examine the evidence of the monument. If that evidence is not fully conclusive, "the engineer's attention will be directed at once to the record accessories." "This step is so generally necessary that it should be considered simultaneously with the search for the monument, in fact, in their broader significance the accessories are a part of the monument" (supra).

None of the monuments that the BLM claims to have found are "fully conclusive." This was not only Downer's opinion, but also that of the Administrative Tribunal (97 IBLA 182). The Administrative Tribunal found, when analyzing the W 1/4 of 4 that, "We and [sic] note that, in this respect, the BLM stone is 'widely different from the record'." Thus, Downer is instructed by the 47

Manual to further investigate and not blindly accept that monument.

Regarding the NW of 9, the Court held, "We now conclude, in accordance with the survey manual at 5-7, [1973 Survey Manual] [1947 Manual §353] that the nature of the accessories is 'greatly at variance with the record'" 97 IBLA at 214.

Concerning the 1/4 corner between sections 4 and 9, the IBLA stated:

> "The fact remains that BLM's 1/4 corner does not match the call to 'Carter's house' whereas appellant's corner does, within a reasonable level of tolerance. This also raises doubts as to the accuracy of BLM's location of a south 1/4 corner." (Citations omitted) 97 IBLA at 197

Additionally, there were no bearing trees at that corner. There should be two (ROA V3, p117).

> "There being a reasonable doubt, the 1/4 corner described in the resurvey notes and monumented by BLM cannot be considered to have been found, and the monument described cannot be deemed a faithful perpetuation of the original corner. We find no error in Judge Luoma's conclusion." 97 IBLA at 218

BLM's 1/4 corner between sections 4 and 9 is not an original corner.

> "The monument discovered by the Jones survey [and adopted by the BLM] is admittedly not the original monument." (Brackets added) 97 IBLA at 189.

Thus, evidence to support the location of the monuments that the BLM has relied upon is "not fully conclusive."

If the evidence of the monument is not fully conclusive, then "It will suffice to state that the evidence of the accessories should agree with the record contained in the field notes of the original survey, subject only to such changes as reasonably may be expected" (47 Manual §353).

The 47 Manual, continues as follows:

> "354. In case of material disagreement between the particular evidence in question and the record calls, the process of elimination of those features regarding which there may be doubt, after making due allowance for natural changes, will serve a most useful purpose, as follows:
>
> (a) The character and dimensions of the monument in evidence should not be widely different from the record;
>
> (b) The markings in evidence should not be inconsistent with the record; and,
>
> (c) The nature of the accessories in evidence, including size, position and markings, should not be greatly at variance with the record.
>
> A certain measure of allowance for ordinary discrepancies should enter into the consideration of the evidence of a monument and its accessories, and no definite rule can be laid down as to what shall be sufficient evidence in such cases. Much must be left to the skill, fidelity, and good judgment of the

engineer in the performance of his work, ever bearing in mind the relation of one monument to another, and the relation of all to the recorded natural objects and items of topography.

No decision should be made in regard to the restoration of a corner until every means has been exercised that might aid in identifying its true original position. The retracements, which are usually begun at known corners, and run in accord with the plan of the original survey, will ascertain the probable position, and will show what discrepancies are to be expected; any supplemental survey record or testimony should then be considered in the light of the facts thus developed. A line will not be regarded as doubtful if the retracement affords the recovery of acceptable evidence." (Emphasis added).

The two rock piles (NW of 9 and N 1/4 of 9) were not fully conclusive. Downer then compared their position with the record calls and distances in the notes and plat. His findings, as set forth in his previous brief and herein were in such disagreement that he was compelled to dismiss these piles of rock.

Downer did re-do the survey starting from a known corner and he did run it in accord with the plan of the original survey (i.e., following the survey notes).

"Corners which cannot be recovered by evidence of monuments or accessories are regarded as obliterated to the extent that they may still be recovered on the basis that

their location has been 'perpetuated' or that collateral evidence establishes their location. Id. at 5-9. Such collateral evidence is generally considered to be 'proper relation to known corners, and agreement with the field notes regarding distances to natural objects, stream crossings, line trees, and off-line tree blazes, etc., or unquestionable testimony.'" (Emphasis added) 97 IBLA 182 at 186.

The import of the above is that if there is a question concerning the monument, the surveyor should look to all available evidence including the notes and plat. Because the plat map and notes are part of the patent granted to Carter in 1882, they assume additional significance. The 47 Manual, § 562, states:

"562. The importance, and legal significance, of the plats and field notes is set out in Alaska United Gold Mining Co. v. Cincinnati-Alaska Mining Co., 45 L.D. 330, 336 (1916), as follows:

'It has been repeatedly held by both State and Federal courts that plats and field notes referred to in patents may be resorted to for the purpose of determining the limits of the area that passed under such patents. In the case of Cragin v. Powell (128 U.S. 691, 696), the Supreme Court said:

'It is a well settled principle that when lands are granted according to an

> official survey of such lands, the plat, itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they were conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself.'
>
> These legal principles apply to subsequent deeds of transfer related to the official plat." (Emphasis added).

The Trial Court's error was that it assumed that any pile of rocks was a monument. The Trial Court never analyzed the methodology necessary to determine if a pile of rocks is the "monument." The 47 Manual, as demonstrated above, specifically sets forth this methodology. Downer followed these instructions and made the proper determination. If the monument is not fully conclusive, calls and distances must be used to determine the probable position of the original monument. According to the 47 Manual, "Much must be left to the skill, fidelity, and good judgment of the engineer in the performance of his work, ever bearing in mind the relation of one monument to another, and the relation of all to the recorded natural objects and items of topography." Not only by the "good judgment" of Downer, but by

the decision of the IBLA Tribunal when using th preponderance of evidence test, Downer's survey i the more correct. "Appellants' evidence generall supports the accuracy of the 1881 survey." (97 IBL 182 at 219).

IV.

DOUBLE PROPORTIONMENT WAS NOT AN AVAILABLE ALTERNATIVE IN 1965

Hannemans argue that, "if a corner was lost o obliterated that he [Downer] had a duty to reset th corner by double proportionant measurement." Thi is not what the manual directs. An obliterate corner can be reestablished from the notes and plat

> "355. An obliterated corner is one a whose point there are no remaining traces o the monument, or its accessories, but whos location has been perpetuated, or the poin for which may be recovered beyond reasonabl doubt, by the acts and testimony of th interested landowners, competent surveyors, o other qualified local authorities, or witnesses or by some acceptable record evidence.
>
> A position that depends upon the use o collateral evidence can be accepted only a duly supported, generally through prope relation to known corners, and agreement wit the field notes regarding distances to natura objects, stream crossings, line trees, and off line tree blazes, etc., or unquestionabl testimony." 47 Manual, section 355.

> "No decision should be made in regard t the restoration of a corner until every mean has been exercised that might aid in identifyin

its true original position. The retracements, which are usually begun at known corners, and run in accord with the plan of the original survey, will ascertain the probable position, and will show what discrepancies are to be expected; any supplemental survey record or testimony should then be considered in the light of the facts thus developed. A line will not be regarded as doubtful if the retracement affords the recovery of acceptable evidence." 47 Manual, section 354.

Downer considered double proportionment (ROA V7, p449). However, he did not find enough reliable points with which to accomplish this task. He therefore determined to follow the notes and plats from a known good corner (ROA V7, p450).

The Administrative Tribunal, in 97 IBLA 182 at 220, stated:

"If proportionant measurement is used to set the corner common to secs. 4, 5, 8, and 9, care should be exercised to determine if the corner can be more readily determined using reliable topographic calls or other evidence set forth in the 1881 field notes, rather than the corner common to secs. 4 and 5, T. 11 N., R. 21E., and secs. 32 and 33, T. 12 N., R. 21 E., which was reestablished in the 1973 resurvey of T. 12 N., R. 21 E. See Survey Manual at 5-16. [1973 Survey Manual]"

Thus the IBLA cautioned against double proportionment.

V.

THE TRIAL COURT'S RULING IS BASED ON PHYSICAL IMPOSSIBILITIES

On page 12 of their Reply Brief, the Hannemans set forth the definition of the preponderance of the evidence test. The Court being found, by a preponderance of the evidence, that Downer failed to act reasonably. Not only has it been shown that Downer followed the 47 Manual which sets his standard of conduct, but this ruling means that the Trial Court ignored the fact that a line drawn from the BLM's placement of the northwest corner of 9 on the bearing contained in the 1881 notes passes two chains south of a tunnel. The 1881 notes say that that line passes one chain north. The IBLA stated, "We are unwilling to believe that the original surveyor could not distinguish north from south however inaccurate they may otherwise have been" (97 IBLA at 198). Not only is this determination res judicata but the fact is that no reasonable person would assume that north meant south or that south meant north. Additionally, no reasonable person could believe that a stone that was actually 16" x 10" x 5 and granite, was the same stone that was described in the 1881 notes as 42" x 40" x 24" and trachyte [1/4 of 4]. Thus, the logical inconsistencies are apparent.

The Trial Court cannot disagree with Judge Luoma's conclusion. "Judge Luoma particularly found 'most disturbing' the fact that the BLM's resurvey was in 'complete non-conformity to the record calls'" (97 IBLA at 215).

Forsythe testified at the Trial Court that he "didn't hit all the 1881 calls exactly." ROA V4, p145. This is a far cry from "complete nonconformity."

From the above, it is apparent that the Court below based its conclusion concerning Downer's negligence on the fact that the BLM found a pile of rocks and that monuments control over calls and distances. However, as shown above, the Court never analyzed or considered that the first step in this process is to determine whether or not a pile or rocks is the actual monument. That process is specifically spelled out in the 47 Manual and was specifically followed by Downer. His conclusions in relation to those monuments are supported by the IBLA decisions.

VI.

THE NORTHWEST CORNER OF 4

This issue has been addressed in Downer's opening brief, on page 18, and also on page 26 beginning at line 9.

The fact that Forsythe, in 1973, chose corners in that northern section that Downer had discarded,

and later, in 1982, used those corners to support his placement of the northern line of section 9, cannot be used to reflect on Downer's actions in 1965. As noted, the IBLA opinioned that these points were (1) suspect, and (2) shouldn't be used in setting the NW of 9, See 97 IBLA at 211, ft.note 35 and at 220. Forsythe stated that, at the administrative level, Downer presented no contradictory evidence. "A. Isn't it true, that Mr. Downer did present evidence of that contradicted evidence as to the location of the north boundary line of section 4? A. No, he did not. IBLA said he didn't." ROA V4, p190.

VII.

THE HIGHWAY SURVEY

On page 7 of their Reply Brief, the Hannemans support Forsythe's placement of the NW of 9 and the N 1/4 of 9 (S 1/4 of 4) by reference to a Highway department survey. The Administrative Law Tribunal, in 97 IBLA at 189 stated:

> "In his September 1985 decision, Judge Luoma did not accept BLM's location of the south 1/4 corner, referring to the lack of testimony regarding the State highway department's 'methodologies' and 'BLM's reconstruction of a purported monument.' (citation omitted) We also find that there is a definite absence of any testimony regarding how BLM or the Jones survey translated the State highway department right-of-way maps and

field notes into a fixed location for the 1/4 corner. Moreover, even assuming that this can be done, the accuracy of BLM's location of the corner is totally dependent on the accuracy of the State highway department's determination regarding the location of his 1/4 corner. There is, however, little or no evidence regarding what the State found at the purported corner or what, if any, resemblance it bears to the original monument described in the 1881 survey field notes. We are simply unable to test the 'bona fide character' of the evidence regarding the State highway department's location of the 1/4 corner. (Survey Manual at 5-11) Moreover, the location of this corner is not supported by other collateral evidence that BLM's south 1/4 corner bears a 'proper relation to known corners' or agrees with the 1881 survey field notes regarding distances to various intervening calls to the east and west. (Survey Manual at 5-9) The monument discovered by the Jones survey is admittedly not the original monument. Appellants also state they were unable to find any evidence of the tree stump described by Neitz and BLM's dependent resurvey makes no mention of that stump. The field notes for the resurvey state: 'There is no remaining evidence of the original bearing tree.'"

Likewise, there was no evidence presented to the Court below to demonstrate the "methodologies" of the State Highway Department.

VIII.

PLAINTIFF'S EXHIBIT D CANNOT BE RELIED UPON BY THE COURT BELOW

On page 20 of its Findings of Fact, Conclusions of Law and Judgment the Court states:

> "Plaintiff's Exhibit D is the most graphicillustration of DOWNER's failure to meet the standard of care. Every one of his own surveys since 1965 differs from the previous one, and every one of his surveys establishes boundaries in Section 9 which are different from the BLM survey." (Emphasis original).

If the discrepancies in Downer's three surveys are the "graphic illustration of DOWNER's failure to meet the standard of care" because they are all different, then the resurvey done by the BLM, in 1985, should have even more significance. The second BLM survey differs by approximately 160 feet to the south and east (2.43 chains x 66 ft = 160 ft). Contrastingly, Downer's placement of the line varies by less than sixty (60) feet. ROA V7, p484-485. Also, the line set forth in by Downer in 1965 was conservative because he "...[D]id not want to put Jacobsen's parcels into any kind of jeopardy by the possibility of claiming more than he was entitled to." (ROA V6, p423-424). Later in the 1980's, with more evidence, Downer placed the line on the line chops.

The same exhibit was used at the IBLA hearing The IBLA stated (97 IBLA at 191, Footnote 9):

> "Bland testified that BLM was concerned with 'inconsistencies' in appellants' evidence o the 1/4 corner because of a shift in appellants location of that corner between the 1965 an 1982 surveys. (citation omitted) Downer

> admitted that the 1965 survey was 'incorrect' [short 30 ft.]. (citation omitted) We cannot find fault with a change of opinion if the change is based on subsequently gained information." (Citations omitted) (Brackets added)

The IBLA, using their administrative expertise, could not find fault with this situation and it is submitted that the Trial Court cannot.

IX.

THE STATUTES

On page 6 of their reply brief, the Hannemans state that Downer did not follow his statutory duty, citing NRS 625.350. No statement of how Downer has failed to comply with the Statutes and no statement of how his failure to comply led in any way to any damages suffered by the Hannemans is set forth. Additionally, there was no allegation or presentation of evidence below regarding Downer's now alleged failure to comply with any state statute. The Supreme Court will not decide a matter that was not litigated or decided by the lower court. See McKay v. City of Las Vegas, 106 N 203.

Not mentioned to date is the 1965 version of NRS 625.340 which reads as follows:

> **"Records of survey: When filing required.** After making a survey in conformity with the practice of land surveying, the surveyor shall, within 90 days after the establishment of points or lines, file with the county recorder in the

county in which the survey was made a record of such survey relating to land boundaries and property lines, which discloses:

xxx

2. A material discrepancy with such record.

3. Evidence that, by reasonable analysis, might result in alternate positions of points or lines."

Downer's map, when compared to the 1881 plat map, shows no material discrepancies.

In Downer's opinion, backed by common sense, no reasonable person, with the information Downer had in 1965, would assume that the north boundary line of section 9 was south of the mining tunnel, when in fact the notes called for it to be north of the mining tunnel.

This statute must be interpreted in light of the facts as they existed in 1965 when Downer was doing his original survey. The trees attendant to the mound in the NW of 9 had not been age of the north boundary of section 4 had not been done.

Downer was guided by the following principles when doing his survey.

1. Reasonable analysis.

2. More convincing evidence.

3. Sec. 562 of the 1947 Manual, which sets out the rules for "determining the limits of lands that were granted according to an official survey o

such land."

4. Preservation of senior rights. The 1881 survey is the senior survey, and the Carter Homestead is the senior right.

5. Harmony in distance, angle and area, with true corners as described in the 1881 plat and notes.

6. Common sense.

Below is a list of discrepancies and assumptions made by Downer in 1965.

ROA V6	401-4	double corners in area
	403	1881 notes accurate
	403	1881 survey done well
	404	double corners
	404	patent 160 acres
	404	calls to Carter station
	406	assumption notes correct
	413-414	location of Bodi Road
	420	Indian allotment 1 mile north
	422-423	line chops
	424	blazed trees
	425-427 and 430	Carter Station
	431	tunnel
	432	BLM position no line chops
ROA V7	439	rejected because of the "accumulative effect of many points with discrepancies similar"

441	SE of 9 to NW of 9 short
442	no line chops to monument
443	line chops in different area attempted to double proportion
444	north of township line
445	more double corners north of township line
446	NW5 Bodie Road matched (BLM adopted wrong monument)
448	NW of 33, 2.7 chains long, 3' west
449	NW of 4 did not fit, pile of rock at potential
449	N township line totally unavailable
449	449 not feasible to double proportion
458	tunnel, clincher
461-2	Law of probability dictated that couldn't use rock piles

In 1965, Downer made an exhaustive search in section 9 and located the SE corner, the E 1/16 of 9 and 16, and the E 1/16 corner, which are shown on the map (Ex.EE).

Adhering to the rule set forth in the 47 Manual Sec. 562, supra, Downer, using copies of the origina

1881 notes and plat, located the topographic calls to Carters and to the "tunnel." He then analyzed all of the above corners and evidence.

The 47 Manual, in Sec. 359 states, "It is a matter of utmost importance to determine where an identified call of the original field notes shall operate to control for both latitude and departure, or for either coordinate by itself..."

The call to "Carters" operated to control the location of the north line of Sec. 9, placing Carters S 12.5° E 16 chains from the section line (1031 ft.) Ex.0 p346. The "tunnel also operated to control the north line, placing it one chain to the north of the tunnel. The SE of 9 operated to control the location of the north line one mile to the north. The E 1/16 between section 9 and section 16 [a point on that line 1/4 of the distance between the corner points] operated to control the location of the north line one mile to the north.

When these four (4) controls were analyzed they all agreed together upon a location for the north line of section 9 with only about one-half chain of variation from each other.

Upon applying the record measurements from the four widely separated points, and finding that they all agreed closely in the location of the north section line, it is apparent that the laws of

probability preclude any other location.

There were no found monuments that upon "reasonable analysis might result in alternate positions of points or lines." The two monuments tied to by the Highway department, in 1919, could not possibly qualify under a reasonable analysis, being hundreds of feet at variance with the record calls and distances as described in the official 1881 plat and notes. They totally fail the requirements of section 562 of the 47 Manual for locating the boundaries of lands "granted according to the official survey of such lands."

As accurately demonstrated in his briefs, with the information that Downer possessed in 1965, no reasonable analysis could have placed the northern boundary of section 9 where the BLM placed it in 1982 or 1985.

X.

MEASURE OF DAMAGES

Assuming arguendo that Downer is liable to future purchasers, then Downer adopts the measure of damages as set forth on page 8 and 9 of respondent, Jacobson's answering brief.

Additionally, Downer adopts the statement of the law as set forth on page 17 in Respondent/Cross-Appellant, Hannemans' Reply Brief to Robert C. Downer's Opening Brief for the proposition that if

any damages are awarded against Downer, and they are not limited to the purchase price of the vacant lot transferred by Jacobsen to Fraiser, they should be limited in amount to the price paid to Fraiser by Swenson. This argument is based on the fact that, as demonstrated by Hannemans, Fraiser had an independent duty prior to selling the property to determine the true boundaries of the land he sought to sell. This independent duty supersedes any duty that Downer may have had to subsequent purchasers.

XI.

DUTY TO PURCHASERS

In 1966, Downer Engineering entered into an oral contract with Stoddard Jacobsen to survey a portion of his property. This survey was completed in 1966. Approximately eighteen (18) years later, Jacobsen, the Hannemans, and the Swensons seek to hold the defendant Downer liable pursuant to this contract and the work done thereunder.

The existence of a duty to a particular person is a question of law:

> "The determination of any question of duty-that is, whether the defendant stands in such relation to the plaintiff that the law will impose upon him an obligation of reasonable conduct for the plaintiff-has been held to be an issue of law for the court rather than for the jury, to be determined by reference to the body of statutes, rules, principles and procedures which make up the law." 57A Am Jur

2d, Negligence, §86.

> "In fixing the bounds of duty, not only logic and science but also policy play an important role, for, as it has been said, the imposition of a duty is an exercise of judicial policy making. A line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit." Id. §87

Downer did his work for Jacobsen who then sold the property. Negligence will not lie in this situation.

> "But no duty of care arises from a vendor-vendee relationship." Weggen v. Elenn-Parker Elec. So. (SD Iowa) 510 F Supp 252.

If Jacobsen owes no duty of care to the vendees then neither does Downer.

> "Traditionally, the general rule has been that no cause of action in tort can arise from the breach of a duty existing by virtue of contract unless there is between the defendant and the person injured what is termed 'privity of contract.'" 57 Am Jur 2d, Negligence, § 122

Admittedly, this general rule has decreased in effect in recent years. However, in like situations and after the passage of a number of years, liability has been terminated.

Recovery for improvements to real property i

limited to, at the most, twelve (12) years after construction, with or without privity of contract. If this survey is considered to be a construction or improvement to real property, the longest time that Downer could be liable under any theory is twelve (12) years. See Nevada Revised Statutes 11.203, 11.204 and 11.205. Because Downer's services are akin to those covered under the above statutes, policy considerations should help this court find that no duty exists.

> "Liability for negligent conduct may only be imposed where there is a duty of care owed by the defendant to the plaintiff, and where there is no legal duty there can be no actionable negligence." 57 Am Jur 2d, Negligence, §89.

XII.
CONCLUSION

The Court below expressed its reasoning for determining that Downer's conduct fell below the standard of care by pointing to specific conduct and assumptions by Downer. Downer has demonstrated that his conduct and assumptions are set forth in the Manual of Survey Instructions or supported in 97 IBLA 182. The methodology for a potential resurvey is expressly set forth at 97 IBLA at 220. Downer did exactly that in 1965 (See Downer's Opening Brief, p24-26). Nowhere in the 47 Manual is the substantial evidence test for monument identification even

mentioned. Downer cannot be held negligent because of the imposition, years later, of that standard.

DATED this 25 day of January, 1993.

THE LAW OFFICES OF

DANIEL R. WALSH

By /s/ Jon M. Yaple

Jon M. Yaple,

C: downer/appeal/final

IN THE SUPREME COURT OF THE STATE OF NEVADA

ELDON HANNEMAN and PATRICIA

No. 23434

HANNEMAN, HUSBAND and WIFE

Appellants,

vs

ROBERT C. DOWNER, MAXINE V.

SWENSON, and STODDARD JACOBSEN,

Respondents.

_____/

ROBERT C. DOWNER,

Cross-Appellant,

vs.

ELDON HANNEMAN and PATRICIA

HANNEMAN, HUSBAND and WIFE;

MAXINE V. SWENSON; STODDARD

JACOBSEN,

Cross-Respondent

_____/

MAXINE V. SWENSON,

Cross-Appellant,

vs.

ELDON HANNEMAN and PATRICIA

HANNEMAN, HUSBAND and WIFE;

ROBERT C. DOWNER; and STODDARD

JACOBSEN,

Cross-Respondents.

_____/

CROSS-APPELLANT/RESPONDENT/CROSS-RESPONDENT

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORTIES	iii
GLOSSARY	v
METHODOLOGY TO DETERMINE ORIGINAL CONERS	vii
ISSUES ON APPEAL	viii
STATEMENT OF THE CASE	
I. CROSS-APPELLANT DOWNER'S STATEMENT OF THE CASE	1
A. BACKGROUND	1
II. FACTUAL BACKGROUND	2
A. INFORMATION GATHERING	3
B. ADDITIONAL ASSUMPTIONS MADE BY MR. DOWNER	5
C. PROCEDURE ON THE GROUND	5
D. THE BLM SURVEYS	9
ARGUMENT	11
III. DOWNER'S STANDARD OF CARE	11
IV. THE COURT ERRED IN DETERMINING THAT DOWNER DID NOT MEET THE STANDARD OF CARE	11
V. FORSYTHE IS NOT AN EXPERT, THEREFORE HIS TESTIMONY CANNOT SUPPORT THE RULING OF THE COURT AS TO MR. DOWNER'S LACK OF CARE.....	14
VI. THE COURT BELOW DID NOT UNDERSTAND THE IMPORTANCE OF THE IBLA DECISIONS.....	14
VII. RES JUDICATA AND COLLATERAL ESTOPPEL AND RELATED PRINCIPLES OPERATE AT THE ADMINISTRATIVE LEVEL.....	16

VIII. THE REQUISITE DEGREE OF PROOF.....17

IX. THE 1973 SURVEY.....18

X. THE LOCATION OF THE BODIE ROAD.....18

XI. THE FOUR CRITICAL POINTS.....19

A. THE WEST 1/4 of 4.....19

B. THE NORTHWEST CORNER OF SECTION 9 (SW of 4).....21

C. THE NORTH 1/4 CORNER OF SECTION 9 The S1/4 Corner of 4).....22

D. THE NORTHEAST CORNER OF SECTION 9 (SE of 4).....23

XII. DOWNER'S ASSUMPTIONS AND CONDUCT DURING HIS 1965 SURVEY WERE VALIDATED BY THE IBLA.....24

XIII. DOWNER OWES NO DUTY TO SUBSEQUENT PURCHASERS.....27

XIV. ASSUMING ARGUENDO THAT DOWNER IS FOUND TO OWE A DUTY TO SUBSEQUENT PURCHASERS, HE SHOULD BE LIABLE ONLY FOR THE PURCHASE OF A VACANT LOT WITHOUT IMPROVEMENTS.....28

XV. FAILURE TO JOIN IN THE FEDERAL LAWSUIT PRECLUDESRECOVERY.....29

XVI. AT THE SUMMARY JUDGMENT STAGE, NO PARTY OFFERED ANY EXPERT EVIDENCE THAT DOWNER'S ACTIONS FELL BELOW THE APPLICABLE STANDARD OF CARE.....29

CONCLUSION.....30

TABLE OF AUTHORITIES

CASES **PAGES**

AAA Equipment & Rental, Inc. v. Bailey,
384 So.2d 107..... 16

Backer v. Gowan, 73 Nev. 34 (ROA V3).....17

Brown v. Fidelity Union Trust Co.,
9A.2d 311, 126 N.J.Eq. 406..... 16

Clark v. Sypress Sures Development Co.,
516 So.2d 622 (ALA.1988).....28,29

Crow Indian Agency, 78 IBLA 7 (1983).....18

Edwards v. Superior Court of California for Eldorado County, 98 S.Ct. 891, 434 U.S. 1046, 54 L Ed 797.....14

Estate of Beach
542 P.2d 994, 125 Cal. Rptr. 570..... 14

Jacobsen and Downer v. BLM,
IBLA 84-762..... 15

Jacobsen and Downer v. BLM,
97 IBLA 182 (ROA Ex.2).....vii., 2, 3, 5, 6, 7, 8, 10
13, 15, 17, 18, 19, 20, 21, 22, 24

Jacobsen and Downer v. BLM,
103 IBLA 83 (ROA Ex. 4).....17, 21,24

McCarty v. Bauer,
3 Kan 237 (1865)..... 11

Palivoda v. Bruette,
250 A.2d 808..... 30

Paragon Engineering Inc. v. Rhodes,
451 50 2d 274 (ALA 1984).....14

Sorenson v. Pavlikowski,
. 94 N. 440, 443, 581 P.2d 852 (1978)..... 11

Sutton v. Mississippi,
. 7 L.D. 562 (1888)..... 13

Weggen v. Elenn-Parker Elec. Co.,
. (SD Iowa 510 F.Supp.252..... 28

STATUTES

Nevada Revised Statutes 11.203, 11.204 and 11.205.....28

TREATISES

Manual of Instructions for the Survey of the Public Lands of the United States, Technical Bulletin No.6, BLM,1973(Survey Manual)..... 2

Am. Jur. 2d, Administrative Law, Sec.504..... 16

12 Am. Jur. 2d, Boundaries, Section 72, Page 609.....17

22 Am. Jur. 2d, Damages, § 544.....29

46 Am. Jur. 2d, Judgments.....17

47 Am. Jur. 2d, Judgments §1072.....16

57 Am. Jur. 2d, Negligence, §122.....28

57A Am. Jur. 2d, Negligence, §86.....27

GLOSSARY

According to Cross-Appellant Downer

1/4 CORNERS

A point on a section line and is one-half the distance between the mutual corners of two sections.

1/16TH CORNER

A point on/off of a section line. If on a section line, it is 1/2 the distance between the 1/4 corner and the corner.

If inside a section, it is 1/4 the 80 chain distance north/south and/or east/west.

ALIQUOT

An aliquot part is 1/2, 1/4, 1/8, 1/16, 1/32 or 1/64 of a section and is square.

BEARING

Direction the compass points.

BEARING TREE

Marked tree near a corner of 1/4 corner.

BLAZED TREE

Specially marked tree on the section line.

CALL

Measurement of distance and angle to an object from a monument or point on a line.

CHAIN

A surveying tool used for measuring distance. (one chain = 66 feet; 80 chains = 1 mile)

DEPENDENT RESURVEY

"A dependent resurvey is an official re-marking of the original lines upon a plan whereby existing

evidence of the original survey is given primary control over the position of the lines to be reestablished." (Ex. DD pg 410)

DOUBLE PROPORTIONANT METHOD

Same as the proportionant measurement but points in a north/south direction as well as an east/west direction are used to establish a point. This point will be a corner.

IBLA

Interior Board of Land Appeals. Administrative quasi judicial hearing board for federal land disputes.

INDEPENDENT RESURVEY

Takes into account the original survey but puts the rights of property owner paramount.

LINE

The boundary between two sections.

LINE CHOPS (CHOP LINES)

Axe cuts on trees near or at the section lines.

PROPORTIONATE MEASUREMENT

A means of placing a section line whereby a measurement is taken from the nearest found adjacent corners on either side of the lost corner and the ratio of the distance between them is used to determine the line.

RETRACEMENT

Method of dependent resurvey following original survey.

SECTION

The units that make up a township. They are one mile square which is 640 acres.

TOWNSHIP

A six mile by six mile square area containing 36 sections(36 square miles).

TRAVERSE

To go from point A to point B in a series of straight lines of different bearing;

METHODOLOGY TO DETERMINE ORIGINAL CORNERS

"Original survey lines are to be reestablished under a dependent resurvey by recovering or restoring the original corners by any of three methods, in descending order of importance. See generally Manual of Instructions for the Survey of the Public Lands of the United States, Technical Bulletin No. 6, BLM, 1973 (Survey Manual) at 5-1 through 5-46. First, corners can be recovered by finding evidence of monuments or accessories which 'agree with the record in the field notes of the original survey subject to natural changes' (Survey Manual at 5-6). In the case of 'material disagreements between the particular evidence in question and the record calls,' which cannot be accounted for by natural changes, the Survey Manual sets forth guidelines to follow in determining which features to eliminate as doubtful:

(1) The character and dimensions of the monument in evidence should not be widely different from the record.

(2) The markings in evidence should not be inconsistent with the record.

(3) The nature of the accessories in evidence, including size, position and markings, should not be greatly at variance with the record.

> Allowance for ordinary discrepancies should be made in considering the evidence of a monument and its accessories. No set rules can be laid down as to what is sufficient evidence. Much must be left to the skill, fidelity, and good judgment of another and the relation of all to the recorded natural objects and items to topography." Jacobsen and Downer v.BLM, 97 IBLA 182, 185.

ISSUES ON APPEAL

1. Did Downer's actions in 1965 fall below the standard of care of a licensed surveyor in Nevada?

2. What effect do the decisions from the IBLA have on this Court's interpretation of the evidence.

3. If Downer's conduct fell below the standard of care, whom does his duty encompass?

4. If Downer did have a duty to subsequent purchasers and his conduct fell below the applicable standard of care, what is the measure of damages to each subsequent purchaser?

STATEMENT OF THE CASE

I.

CROSS-APPELLANT DOWNER'S STATEMENT OF THE CASE

A. BACKGROUND

This case involves potentially confusing information concerning the methodologies and terminologies used by surveyors in determining boundaries to lands. A few basic facts set forth hereunder will greatly aid the Court in understanding the factual information to be supplied later. Additionally, a Glossary of terms has been supplied to assist the Court.

6	5	4	3	2	1
		...			
7	8	9	10	11	12
18	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

The United States, in the West in 1881, used a rectangular surveying system. Under the rectangular surveying system, sections* are laid out in a six (6) section by six (6) section square as shown above. Each section is thus ideally one (1) mile square

(640 acres) (ROA V4 p99) (80 chains* on a side, RO V4, p173). Each township* contains thirty six (36 sections. In the 1800's the surveyors first surveye the township boundaries (the 6 mile by 6 mile boundar of the township). Later surveyors came in an sectioned the township. They would begin in th Southeast corner of the township (Section 36) an proceed North and West until they completel delineated all of the sections within the township It was normal for there to be some discrepancie when the surveyors reached the northern and th western parts of the township, either because th township line* was not exactly 6 miles by 6 miles o because mistakes had been made in sectioning th township. These mistakes were to be corrected i the northern and/or western tier of sections a needed (Jacobson and Downer v. BLM, 97 IBLA 18 p220, hereinafter ROA Ex.2). The surveyors place monuments at the intersection of the section corner and also marked 1/4 corners* of the sections. Th surveyors were to measure the section lines on th true North and the true East/West compass point (ROA V4 p100). Because of the nature of the survey the northern boundary of a section is the same a the southern boundary of the section above. Therefor the Northwest corner of Section 9 is the Southwes corner of Section 4.

The Bureau of Land Management (BLM(is charged with resurveying these sections if, among other things, there are disputes concerning a boundary line that involves federal property.

II

FACTUAL BACKGROUND

This case involves a dispute as to the boundary between Section 4 and Section 9 in Township 11 North Range 21 East, Mount Diablo Meridian (T.11N.R.21E.MDM) (See grid supra). Prior to any government surveys in this area, William Carter moved in and built a house and out buildings in an area that would later be mapped out as Section 9 of T.11N.R.21E.MDM. Carter's barn was built north of a ravine that ran through the property while the house was built south of the ravine (ROA Ex.2 p196; Ex.00).

In or about 1881 the surveying team of Stewart and Conkling conducted a survey of the internal sections of T.11N.R.21E.MDM (ROA Ex.0). Stewart and Conkling began in the lower right hand section and proceeded North and West as was the normal procedure (ROA Ex.0). The survey was completed and approved by the United States government.

In 1882 Carter received a homestead patent on the lands that would later devolve to Stoddard Jacobsen and thence, through him, to the other parties to this lawsuit (ROA Ex.V). That patent specifically

granted Carter one hundred sixty (160) acres.

In or about 1965, Cross-Appellant, Robert C. Downer, contracted with Respondent, Stoddard Jacobsen, to survey a portion of that 160 acre parcel which had originally been granted to Carter by President Hayes. Its northern boundary (which is the boundary line in question in this lawsuit) is the line between Section 9 and Section 4. (ROA Ex.A) Downer used the following steps in conducting his determination of that northern boundary.

A. INFORMATION GATHERING

The information gathered by Downer included all the documents from the BLM (ROA V6 p398). Downer bought the plats and asked for all of the surveys done in T.11N.R.21E.MDM. No one at the BLM told him that this Stewart and Conkling survey was suspect (ROA V6 p399). Downer obtained the notes and plat for T.12N.R.21E.MDM (ROA V4 p40) and also the material from a survey done by Reppert in or about 1913 (ROA V6 p400), and the State Highway Department layout sheets (ROA V6 p400). Downer went to the Douglas County Court House to check on other private surveys (ROA V6 p400). Downer also used the 1947 Manual of Instructions for Surveying of Public Lands (ROA V6 p401).

As part of his information gathering, Downer relied upon information about the area that he had

known of previously. In 1935 through 1942, Downer worked for the Highway Department (ROA V6 p390). During that time he was made aware of the potential for double corners in the area (ROA V6 p391-392). The Reppert notes (Ex.L), a 1913 survey, also state that there are double corners near the area (ROA V6 p401, Ex.L p11). Downer assumed the 1881 survey was fairly accurate with perhaps a half chain sloppiness in a mile (ROA V6 p402). The Reppert survey reinforced this assumption. (Ex.L, p10; ROA V6 p402 L19 and p403). Specifically at L7, "The corners found are well marked and identical with the corners as described in the old field notes. In nearly every case the topographical features of the land substantiate the location of these corners." Also see Ex. L p11; ROA V6 p403, L19: "Considering the rough mountainous nature of the business (sic) [should read "country"] within the township the bearings* and distances might be considered above average of those found in most of the older surveys."

B. ADDITIONAL ASSUMPTIONS MADE BY MR. DOWNER

(1) Mr. Downer assumed that Carter owned 480 acres (ROA V6 p406). (2) He assumed that the 1881 notes were essentially correct (ROA V6 p 406). (3) He assumed that the 1881 plat was correct (ROA V6 p406-407). (4) He assumed that there were 80 chains in the north/south distance of Section 9 (ROA

V6 p407). (5) He assumed that there were approximately 80 chains in the east/west distance of Section 9 (ROA V6 p407). (6) He assumed that any errors in the north/south direction within the township would be taken care of in Section 4 (the northern section) (ROA V6 p407). (7) He assumed that any error in the east/west direction would be taken up in the western most section (ROA V6 p407). (8) He assumed that if there were line chops*, they would fall on the section lines (ROA V6 p423).

C. PROCEDURE ON THE GROUND

Armed with these assumptions, Mr. Downer engaged in the following procedure on the ground. He began his survey at the southeast corner of Section 9 (SE9). He used it because, in his opinion, it was a good corner (ROA V6 p409). Reppert had used the same corner as a good corner in 1913 (ROA V6 p409). The BLM also used that same corner in their 1982 survey (ROA Ex.2 p187). The description of that corner was quite similar to the original 1881 description (ROA V6 p410). Mr. Downer then went west on the southern section line of Section 9 and came to a monument delineating the east 1/16th corner*. It was 12 feet off the record distance (ROA V6 p417). The 80 acres in the southeast corner of Section 9 were an Indian allotment (ROA V6 p416). Downer also found an Indian allotment post that was

1/2 mile north of that east 1/16th point (ROA V6 p417). These were important points because they also marked the eastern boundary of some of Stoddard Jacobsen's property (ROA V6 p417). Both of the above described points were 1308 feet west of the accepted SE of 9 (ROA V6 p416, 419). He then used the highway to traverse* one mile north of the southeast corner of Section 9 (ROA V6 p420) (This is the northern boundary of Section 9 claimed by Downer). Downer then found the monument that the government claims is the N 1/4 of 9 (N1/4 of 9) (ROA V6 p422) (the Highways' 1/4 corner). Downer found line chops in certain areas during his survey (ROA V6 p422). The Interior Board of Land Appeals (IBLA*), in ROA Ex. 2 p215, found this evidence "worthy of note." The line chops were 25 or 30 feet north of the 80 chain distance (ROA V6 p423).

Downer determined that the Highway's 1/4 corner did not match the distance or calls*. It did not match the distance to Carter's as called on the 1881 notes and plat (ROA V6 p425-426). The call was 16 chains (16 x 66 ft = 1056) (See Ex.0, p346). The monument was only 800 feet from Carter Station by Downer's 1965 measurement (ROA V6 p427). The distance and angle to Carter Station was in drastic disagreement with official notes (ROA V6 p430). Downer drew a line eastward from the Highway's 1/4 corner on the

bearing that appeared in the 1881 survey notes. That line was south of a tunnel cited in those notes (ROA V6 p431-432). In the 1881 notes, the line is denoted as north of the tunnel (ROA Ex.0 p346). There were no chop lines or blazed trees* and no evidence of bearing trees* near this 1/4 corner (ROA V6 p432). A good outline of Downer's procedure is contained in ROA V7 p434-437. The above mentioned inconsistencies raised a substantial doubt in Downer's mind (ROA V7 p439). Ultimately, Downer rejected the Highway's N 1/4 of 9. Downer's opinion was not formed immediately but after analyzing the "accumulative effect of many points with discrepancies similar" (ROA V7 p439).

Downer then went to the Northwest corner of Section 9 (NW of 9) (SW of 4). Downer found the mound which was later adopted by the BLM (ROA V7 p439). He compared the location, size and distance of the bearing trees to the 1881 notes (Id). None of these matched (ROA V7 p441) (EX.0, p345; Ex.TT). Downer also measured the distance north to this mound from the known SE of 9. That distance was several chains short of the record distance (ROA V7 p441; Ex.0, Ex.G). There were no line chops leading to the monument (ROA V7 p442). Line chops were found approximately 190 feet north. They were a

continuation of the chops that were north of the N 1/4 of 9 (S 1/4 of 4) (ROA V7 p443). Downer also found line chops about 160 feet west of this monument (ROA V7 p443). Downer also determined that the use of these points would cut a significant portion of the 160 acres belonging to Carter's original patent (ROA V7 p459). This evidence contributed to his suspicion that this monument might not be the correct corner (ROA V7 p443).

Mr. Downer could not find a marker for the NE corner of 9 (ROA V7 p461). Neither the Jones survey (1981) nor the government BLM survey (1982) found an original monument denoting the NE of 9 (ROA Ex.2 p187, first paragraph).

With this doubt as to the authenticity of the monuments, Mr. Downer determined to do more investigation (ROA V7 p439). He attempted to use the double proportionate method* to find the original monuments (ROA V7 p443). Downer went North to the township line to try to find reliable points to use in determining the north line of 9 (ROA V7 p444). Downer found two piles of rock near where he assumed the NW of 4 would be (ROA V7 p444). One had bearing trees. He then went along the section line and he found double sets of corners all along the line (ROA V7 p445). In the northwest of Section 5 Downer found three piles. The calls to the Bodie Road from

two of the piles were very close to 3 chains. From the third pile it was 6 chains (ROA V7 p446). Downer subsequently traveled to the NW of 33, (this is in the southern most section in the township directly to the North, Township 12 (ROA Ex.BB)). He accepted the NW corner of 33 as a good monument (ROA V7 p447) (BLM also accepted this monument). Downer then measured from that monument to the monument with the bearing trees in the NW of 4 and found that it was 3° off and 2.7 chains too long (ROA V7 p448-449). Placement of those bearing trees, in relation to the monument, did not comport with the original 1881 notes (ROA Ex.2 p210). In Downer's opinion it was therefore impractical to try to double proportion to find the northern line of Section 9 because there were no reliable corners in any direction (ROA V7 p449).

After Downer had gathered all the information concerning the position of the monuments near the NW of 9 and the N1/4 of 9, he formed an opinion, and rejected these monuments because they did not agree with anything (ROA V7 p452). The facts that solidified Downer's rejection of the monuments in the northern area of Section 9 are summarized in ROA V7 p447-449 and 459-465.

Downer then decided to use the calls and distances in the 1881 notes (ROA Ex.0) and the pla

map (ROA Ex.G) to determine the northern boundary of Section 9 (ROA V7 p465). Downer adjusted and checked his determination of the north boundary of Section 9 with the calls and distances n the 1881 notes and plat (ROA V7 p466). Downer used the SE of 9 as a starting point because he felt it was a definite corner (ROA V7 p450) (The BLM also used this corner to begin their 1982 survey (ROA Ex.N). The three principle facts from the notes that he relied on to check his accuracy were (1) the distance north from the SE of 9; (2) the distance of the N1/4 of 9 from Carter Station; and (3) the distance of the line north of the tunnel (ROA V7 p455). Mr. Downer compared the calls in the 1881 field notes as they related to the line that he had established. They all fit with reasonable accuracy (ROA V7 p467).

It is on the above procedures, as confirmed by Mr. Downer during later investigations, that the issue of Downer's standard of care must be measured.

D. THE BLM SURVEYS

In 1973 Mr. Forsythe, who would later do the 1982 BLM resurvey, was directed by the BLM to survey the north line of T.11N.R.21MDM (S. line of T.12) (N. line of Section 4) (ROA V4 p91). During this survey, Mr. Forsythe accepted the monument with the two bearing trees that Downer had rejected in 1965 as the NW of 4 (ROA V4 p94, p96-97 and p103). The

bearing from that monument to the NW of 33 was 3° to the west, instead of due north, and 2.72 chains longer than it should have been (ROA V4 p98). Mr. Forsythe also accepted as the NW of 5, the mound that was 6 chains from the Bodie Road instead of 3 chains as called out in the 1881 field notes (ROA V4 p446).

In or about 1980, the Vita Grande mine conducted a survey in Section 4 (the section just North of Section 9) (ROA V4 p22). This is referred to as the "Jones survey". The Jones survey adopted the markers previously rejected by Downer as the correct monuments for the northern boundary of Section 9 (south boundary of 4). Downer and Jacobsen became aware of this survey and determined that the BLM should be asked to come in and do a survey to settle any questions (ROA V4 p22). In or about 1982 the BLM, under the direction of Neil Forsythe, did a survey of the area (ROA V4 p22). The BLM instructions however were to survey Section 4 (ROA V4 p162) the southern boundary of which is by definition the same as the northern boundary of Section 9. The BLM's survey was a dependent resurvey* (ROA Ex.2 p182). It began at the SE of 9 and went up to the NE of 9 (SE corner of 4). At the NE of 9 they accepted the corner that Jones had established. They accepted the monument that had been rejected by Downer as the N1/4 of 9

They also accepted the second monument that Downer had rejected as the NW of 9.

After Forsythe completed the BLM survey, Mr. Downer protested that survey. A hearing on this issue was held before the IBLA in June of 1985. Prior to that hearing, Mr. Downer went out and did extensive ground work in the area to prove that his survey was correct. The results of much of his work are contained in Exs.BB, EE, FF, JJ, MM, TT and UU. After a hearing and a series of administrative appeals, the IBLA found that the BLM survey was to be followed.

Mr. Downer appealed this determination to the United States District Court in Nevada. Downer's appeal was dismissed based on Downer's lack of standing (ROA Ex.F).

ARGUMENTS

III

DOWNER'S STANDARD OF CARE

Downer is a registered professional surveyor. Under Sorenson v. Pavlikowski, 94 N. 440, 443, 581 P2nd 851 (1978), Downer had a duty to use such skill, prudence and diligence as other members of his profession. A professional is no guarantor of the correctness of his work (McCarty v. Bauer, 3Kan 237 (1865).

Thus, this Court could decide that Downer's survey is correct. It also could decide that even

though the survey is not correct that Downer met the applicable standard of care. Mr. Downer's conduct was reasonable in light of the facts as they existed in 1965.

IV

THE COURT ERRED IN DETERMINING THAT DOWNER DID NOT MEET THE STANDARD OF CARE

In the Findings of Fact, Conclusions of Law and Judgment in this case (ROA V4 p703) at page 9 line 15 through page 10 line 13, the court below set forth its reasoning concerning Downer's failure to meet the standard of care.

Forsythe's testimony, as related by the Court on page 9, is based on an erroneous assumption. Forsythe testifies that Downer did not find the monuments (ROA V4 p144, L23; ROA V4 p189). Downer did find the monument which the BLM claims is the NW of 9. He rejected that monument. He also found the monument that the BLM claims is the N1/4 of 9, he rejected that monument as well.

Secondly, Forsythe's testimony applies only to the process of dividing a section into aliquot* parts (ROA V4 p70, L10). Jacobsen was not subdividing an aliquot part. Downer was hired to do a portion that looked like a spear head. For this type of situation, the aliquot method is wrong (ROA V6 p405).

The Court below determined that the next

assumption that Downer made, "the calls and distances in the Stewart and Conkling survey were accurately measured and recorded," fell below the standard of care. . These notes and plat were part and parcel of the patent given to Carter (ROA V1 p164, 165). The Reppert survey, in 1913, referenced other work nearby done by Stewart and Conkling and stated that the work was above average (ROA Ex.L pg11). No one at the BLM told Downer that Stewart and Conkling's survey was suspect. These field notes and plat are considered the primary record of the survey (ROA V1 p80).

Most significant is the following:

> "Moreover, because survey field notes are deemed 'presumptively correct' and must be 'taken as true' until disproved by a preponderance of the evidence, we must initially presume that the figures given in the notes, including those regarding distances, are correct. Sutton v. Mississippi, 7 L.D. 562 (1888)." (Emphasis added) ROA Ex.2 p192).

Thus, the assumption that the calls and distances in the Stewart and Conkling survey were accurately measured and recorded is one that a competent surveyor in Downer's position must make.

The second assumption that the Court finds falls below the standard of care is that Section 9 contains exactly 640 acres (Id. p10, L7). Downer never made a statement that he considered that Section

9 contained exactly 640 acres. Downer states that the surveyor was off as much as 1/2 chain (33 ft.) in a mile (ROA V7 p493). Forsythe conceded that he would also initially assume that the section would have 640 acres (ROA V4 p99). He also conceded that he would assume that the section line is 80 chains long (one mile) (ROA V1 p173). Any deviations from the 640 acre should be taken up in the north and west sections. Section 9 is neither a north nor west section (ROA V4 p138). The IBLA, in ROA Ex. 2 p220 states:

> "Any adjustment to the size of the sections in T.11 N., R. 21 E., should have been made in the northerly tier of sections, thus making sec. 9 a full 640-acre section."

Thus, the Court's enunciated reasons for Downer's failure to meet the standard of care actually support the fact that Downer did meet the standard of care.

V

FORSYTHE IS NOT AN EXPERT, THEREFORE HIS TESTIMONY CANNOT SUPPORT THE RULING OF THE COURT AS TO MR. DOWNER'S LACK OF CARE

Negligence is never presumed, but each element must be proven. Forsythe is not licensed (ROA V1 p58) and thus has never done a private survey in Nevada. Because Forsythe is not a qualified expert in this area he can make no statements concerning

whether or not Downer met the standard of care.

> "Proof of liability for failure to possess or exercise professional attributes required by those undertaking to render expert services in practice of profession or trade requires testimony of a qualified expert where claimed injury and its causes are beyond common knowledge." Estate of Beach, 542 P.2d 994, 125 Cal. Rptr. 570 15 Ced 623, certiori denied Edwards v. Superior Court of California for Eldorado County, 98 S.Ct. 891, 434 U.S. 1046, 54 L Ed 2d 797.
>
> "Ordinarily, the standard of care to be exercised by a professional surveyor can be established only by an expert witness." Paragon Engineering Inc. v. Rhodes, 451 50 2d 274 (ALA 1984).

Therefore the lower Court's reliance on Mr. Forsythe's opinion suffers from a double fault. First, the assumptions that Downer made are required to be made by every surveyor. Second, Mr. Forsythe is not a qualified expert.

VI

THE COURT BELOW DID NOT UNDERSTAND

THE IMPORTANCE OF THE IBLA DECISIONS

On page 2, line 16 of its decision below, the Court below makes the following statement:

> "An understanding of that process [the administrative process] is necessary, and a discussion of the process is included in order to completely understand the background of the current state law claims."

Admittedly the legal gymnastics engaged in by

the IBLA are confounding. At the IBLA hearing, Downer had "the burden of proving by preponderance of the evidence that the lines and corners as determined by BLM in its 1982 dependent resurvey, do not depict the original survey lines (1881)" (Jacobsen and Downer v. BLM, IBLA 84-762 p1).

Therefore, the Administrative Law Judge ordered the BLM to resurvey the area.

> "On the other hand there appears to be so many deviations form the original calls and distances in BLM's resurvey as to cast doubt on its accuracy. Accordingly, I see no alternative but to remand the case to the BLM for resurvey, a solution suggested by the Board's remand decision." Jacobsen and Downer v. BLM, IBLA 84-762, Findings.

Both the BLM and Downer appealed that decision. The Administrative Law Judge's Appellate Panel, by Mullen (ROA Ex.2) did not apply the above set forth standard to the entire survey. It applied a reasonable doubt standard to each monument.

> "A corner will be regarded as lost where the evidence fails to establish beyond a reasonable doubt that monuments or accessories are those set in the original survey, or that the corner had been perpetuated, or that collatera evidence with respect to courses and distance to known corners or intervening topographica and geographical items on line described i the field notes of the original survey identif the original position of the corner." ROA Ex. at 182.

After this decision, the BLM once again appealed stating that the wrong standard had been used. In this appeal the IBLA Judges did determine that the wrong standard had been used. They found that the proper standard was to apply the substantial evidence standard to each monument.

The IBLA then found against Downer's survey, not based on any negligence of Downer but because they concluded that there was substantial evidence to support the position of the BLM's positioning of the NW of 9, the N1/4 of 9, the NE of 9 and the W1/4 of 4.

VII

RES JUDICATA AND COLLATERAL ESTOPPEL AND RELATED PRINCIPLES OPERATE AT THE ADMINISTRATIVE LEVEL

> "The general rule, applicable to judgments, that a prior determination operates as res judicata or collateral estoppel between the parties to the prior proceeding or those in privity with them, but not as to strangers, applies to administrative determination." 2 Am. Jur. 2d, Administrative Law, Sec. 504.

The IBLA hearings determined an interest in real property and were thus in rem proceedings.

> "However, the rule that a judgment is res judicata not only as to issues decided, but as to all issues which the court might have decided, has been said the [sic] apply to a judgment in rem." 47 Am. Jur. 2d, Judgments §1072.

The judgment is conclusive as to privies.

> "Doctrine of res judicata includes not only those who are actual parties to former judgment but also all persons who are in privity with them, that is having a mutual or successive relationship to the same rights of property." AAA Equipment & Rental, Inc. v. Bailey, 384 So.2d 107.

There is no question that the Swenson's and the Hanneman's are in privity with Jacobsen.

> "Privies are such persons as are privies in estate - as donor and donee, lessor and lessee, and joint tenants." Brown v. Fidelity Union Trust Co., 9A 2d 311, 126 N.J.Eq. 406.

Thus the controlling authorities in this case are the Manual of Survey Instructions and the issues decided by the decisions in front of the IBLA, if those issues were decided using a comparable degree of proof.

VIII

THE REQUISITE DEGREE OF PROOF

> "'For there to be an identity of cause of action within the meaning of the doctrine of res judicata, it has been held that the degree of proof required in the second action must be at least as great as that required to support recovery in the first action.... This rule has been applied where the Plaintiff in the first action is required to prove his allegations by 'clear and convincing evidence,' and in the second action by a mere 'preponderance of the evidence.'" 46 Am. Jur. 2d Judgments, See 415

Pursuant to the above reasoning, both the Swenson's and the Hanneman's are bound by the determination of the issues by the court in Jacobsen and Downer v. BLM, 97 IBLA 182.

Because the issues decided in Jacobsen and Downer v. BLM, 103 IBLA 83 (ROA Ex.4) were decided under the substantial evidence test, they are not conclusive in this proceeding.

In Plaintiff's opposition to Downer's Summary Judgment (ROA V4 p558 at pg 3), Plaintiffs made the following statement:

"The law is well settled as follows:

> ...Where, however, a corner cannot be located by clear and satisfactory evidence, the field notes may then be taken as the next best evidence as to the locations of boundaries" 12 Am. Jur. 2d, Boundaries, Section 72, Page 609. (Emphasis added)
>
> "Nevada certainly follows this law." Backer v. Gowan, 73 Nev. 34." ROA V3 p588 at 3.

This is a statement of the law as it existed in 1965. In 1985 the IBLA determined that the corners did not have to be established by clear and satisfactory evidence but merely by substantial evidence. This is a standard and Downer cannot e held to have known in 1965.

IX

THE 1973 SURVEY

At the IBLA hearing, Mr. Downer presented evidence that the northern boundary of Section 4 had been determined erroneously by Mr. Forsythe in 1973 (See supra). Mr. Forsythe at trial denied that there had ever been a problem with the North boundary (ROA V4 p93). (ROA V5 p94) IBLA in ROA Ex.2 at 209-211 discusses that corner. It determined that the corner was not lost, but stated in foot note 35;

> "35/ This decision is in no small part a result of the increased burden of proof of error which rests with appellants regarding this corner. As previously noted, this corner was remonumented as part of a resurvey of a portion to T. 12N., R. 21 E., which was approved in 1973. A party who challenges the results of a resurvey after that resurvey had been accepted has the burden of showing fraud or gross error in the resurvey by a preponderance of the evidence. Crow Indian Agency, 78 IBLA 7 (1983). As noted previously, there is a lesser burden on the part of the appellants for the other corners challenged by them. The dissent does not recognize this legal distinction."

Thus the IBLA noted that there were major problems with Forsythe's 1973 dependent resurvey of the northern boundary of the township.

X

THE LOCATION OF THE BODIE ROAD

The location of the Bodie Road in the area of

the W 1/4 of 4 is very significant (ROA Ex. SS p1-5). Mr. Forsythe made a measurement from what he considered to be the W1/4 of 4 to a road which he called the Bodie Road (ROA V4 p108, L22-109, L21).

Downer determined that the Bodie Road was a different road to which Mr. Forsythe did not measure. The IBLA in ROA Ex.2 at 201, 202 and 208 endorses Downer's placement of the Bodie Road.

> "As has already been discussed there is a clear dispute between BLM and appellants on the location of the Bodie Road however as noted supra, we accept that the travel way depicted in the 1923 plan (appellant's Exhibit Exh. F) is the Bodie Road. Sheet number 7 of the 1923 plan shows the traveled way crossing the west line of section 4." Id. at 208.

Thus the IBLA has already determined that Forsythe's placement of the road is wrong. When questioned concerning his placement of the Bodie Road, Forsythe admitted that if his placement of the Bodie Road was wrong, then his W1/4 corner of 4 is wrong (ROA V4 p111 L16 through P112 L1).

XI

THE FOUR CRITICAL POINTS

There are four points, the location of which critically bears upon the setting of the north boundary line of Section 9. They are: 1) the W1/4 of 4; 2) the NW of 9 (SW of 4); 3) the N1/4 of 9 (S1/4 of 4); and 4) the NE of 9 (SE of 4).

A. THE WEST 1/4 OF 4

In adopting its corner, the BLM assumed that in the 1881 notes the size of the rock was erroneous, the type of rock was erroneous and that the road that they measured to was the Old Bodie Road. All these assumptions were wrong.

On the stand, Mr. Forsythe admitted that if any one of his three assumptions were incorrect, then his placement of the W1/4 of 4 was incorrect.

The 1881 notes state that the stone marking the W1/4 of 4 is 42" x 22" x 20 p107, L14-19; Ex.0 p347). The stone accepted by the BLM in 1982 was 14" x 6" x 4" (ROA V4 p107, L25-108, L5). Forsythe admitted that this stone is not even big enough to qualify as a marker stone under the definitions of the Manual of Survey Instructions (ROA V4 p108).

> "Judge Luoma concluded that 'it seems unlikely the field notes are describing a 6-inch high stone' (citations omitted). We and (sic) note that, in this respect, the BLM stone is 'widely different from the record.' (Survey manual at 5-7)." ROA Ex.2 p205.

The type of stone set down in the 1881 notes is denoted as trachyte (Ex.0 p347). The stone the BLM accepted is denoted as granite (ROA Ex.N p8; ROa V4 p108). However, during the IBLA hearing, Robert E. Jones, consulting geologist for the BLM, stated that BLM's stone was actually trapstone (ROA Ex. 2 p208).

Mr. Robert E. Jones, appellant's consulting geologist, when asked whether a surveyor before 1910 would know the difference between a trychyte stone and a trapstone, stated that from his experience with cadastral surveys, the early surveyors were "very good on their rock identification" (ROA Ex.2 pg 204). These statements, which Downer contends are controlling on the court below and on this court, conclusively demonstrate that the BLM's placement of the W1/4 of 4 is erroneous.

If the 1/4 corner laid down by the BLM is wrong, this entirely destroys their placement of the NW of 9 (SW of 4) (ROA V7 p517). The court concluded in relation to the W1/4 of 4;

> "However we conclude their (sic) the corner [Downers corner] is 'on line' within an acceptable level of tolerance. By contrast, BLM's greater corner is definitely not on line." ROA Ex.2 p208.

> "In any case, the location of the west 1/4 corner of sect. 4 has not been determined such that the accuracy of the BLM's location of the southwest corner [northwest corner of Section 9] can be verified. To the extent that the evidence supports appellant's west 1/4 corner the accuracy of BLM's location of the southwest corner [northwest of Section 9] is thrown into doubt." ROA Ex.2 at 209.

B. THE NORTHWEST CORNER OF SECTION 9 (SW of 4)

Downer found many discrepancies at the NW of 9 (See supra). The final IBLA appellate decision (ROA

Ex. 4 p87) found that BLM's location of the SW of 4 (NW of 9) was supported by substantial evidence.

At this site there were four bearing trees. The Intermediate Appeal Board when considering those trees stated:

> "The four bearing trees found in the field clearly do not conform to the record." ROA Ex. 2 at 213.
>
> "We now conclude, in accordance with the Survey Manual at 5-7, that the nature of the accessories is 'greatly at variance with the record'." Id at 214.

The Board expressed doubt as to the authenticity of that monument and stated;

> "Having this doubt we cannot hold this corner to be 'found' corner. While the character and dimensions of the monument are sufficiently close to the stone described in the 1881 field notes, the stone is small enough to have been moved. None of the bearing trees found by BLM agree with BLM notes on bearing, distance from the corner, or size. The location of the corner and calls on the line from the corner to the <u>southeast corner of 9</u> have wide discrepancies and there is <u>overwhelming evidence of the existence of multiple monuments in the general area</u>." (emphasis added) (ROA Ex.2 at 216.)

C. THE NORTH 1/4 CORNER OF SECTION 9 (S 1/4 of 4)

In the early 1980's Mr. Downer went back and

gathered more precise measurements to support his 1965 placement of the line. In 1982 Downer walked the area with the BLM and told them about the discrepancy in the call to Carter Station (ROA V7 p469). Despite this, the BLM, in its 1982 retracement*, didn't perform that measurement.

At the administrative hearing there was a conflict between the BLM and Downer as to the placement of "Carters". In ROA Ex. 2 at 196 the IBLA stated;

> "However, even more persuasive that the surveyors meant to tie in the barn rather than the house is the fact that the 1881 survey plat (Govt. Exh. 2), (ROA Ex.00) places 'Carters' north of the ravine. BLM asserts that this demonstrates the fact that the surveyors never travelled to Carter's station. Rather we conclude that it demonstrates that the surveyors tied to the barn which was north of the ravine, rather than the house which was south of the ravine..."

This determination places the position of the BLM 1982 1/4 corner over 300 ft. short and at the wrong angle (ROA Ex.FF).

If the BLM in 1982 had followed the call to Carter Station, they would have realized how drastically the N1/4 of 9 deviated from the 1881 notes.

C.(1). THE TUNNEL

The most incredible piece of evidence which demonstrates the blatant errors of the 1982 BLM

survey is the measurement to the tunnel. The 1881 notes place the north boundary of Section 9 at one chain north of this tunnel (Ex.0 p346). The north section line of 9 is a straight line (ROA Ex.0 p346). If a straight line is drawn from the Plaintiff's placement of the N1/4 of 9 eastward on the bearing set forth in the 1881 notes (89°56') (Ex.0 p346) that line passes almost 2 chains south of the tunnel (ROA V7 p545).

The IBLA stated at 97 IBLA 198, "We are unwilling to believe that the original surveyors could not distinguish north from south, however inaccurate they may otherwise have been." Like the IBLA, during his initial 1965 investigation, Downer was unwilling to believe that the 1881 surveyors couldn't distinguish north from south. In fact it doesn't take an expert to realize that there are serious questions concerning the reliability of a survey that consciously makes an error of this magnitude.

D. THE NORTHEAST CORNER OF SECTION 9 (SE of 4)

In 1982 the BLM accepted the corner that the Jones survey had monumented and described as a "careful and faithful perpetuation of the position of the original corner." (ROA Ex.N p3). In 1988 when BLM did its resurvey, they discarded this careful and faithful perpetuation for what they considered to be the true NE of 9 (ROA Ex.M p367). This new location

of the NE of 9 puts the north section line of Section 9 south of the tunnel!!

In finding Downer negligent, the court below relied in part on the fact that all three of Downer's surveys were different. Obviously the Court missed the importance of the fact that the two surveys that the BLM did were also different and that the BLM admitted the error. Downer's surveys differ by less than 50 feet, while the BLM survey differs by over 160 feet (2.43 chains x 66 = 160.38 ft) (ROA Ex.M p367).

Additionally, the BLM resurvey makes Section 4, the northern most section of the township, approximately 640 acres and Section 9, an internal section, approximately 628 acres (ROA V7 p548). This is directly opposite to the general practice in 1881, 1965, 1982 and 1988.

XII

DOWNER'S ASSUMPTIONS AND CONDUCT DURING HIS 1965 SURVEY WERE VALIDATED BY THE IBLA

Until the IBLA Judges substituted the substantial evidence standard (ROA Ex.4), they recognized that they were confronted with a mass of conflicting evidence.

> "Judge Luoma particularly found 'most disturbing' the fact that BLM's resurvey was in 'complete nonconformity to the record calls' (Decision at 12." ROA Ex. 2 p215.

Therefore, they ordered another resurvey.

In 1965 Downer was confronted with the same problem. He had gathered evidence that rendered the monuments he found extremely suspect.

The IBLA gave specific suggestions to the BLM on the manner of conducting their resurvey. These suggestions fall directly in line with Downer's conduct in his 1965 survey. ROA p554, L2 through P557, L9 points this out.

> "Q. Now, I want you to go to Exhibit 2 and turn to page 219.
>
> A. Okay.
>
> Q. Now, I want you to read -- I want you to read the last two sentences on that page where it begin appellants?
>
> A. Appellant's evidence generally supports the accuracy of the 1881 survey. The evidence of discrepancies presented by BLM almost makes the case for a fraudulent survey. The option of conduction and independent resurvey* remains open to the BLM and should be reconsidered--should be considered. (Asterisk added)
>
> Q. So when Mr. Forsythe was saying that the BLM couldn't do an independent resurvey of this area he was incorrect; wasn't he?
>
> A. That Judge seems to feel like that option is open.
>
> Q. Now, I want you to continue reading on page 220.
>
> A. If a dependent resurvey is made the possibility of a double set of corners was established along the Northern Township of Township 11 north range 21 east. During the course of the subsequent survey in Township 1 north range 21 east in the resurvey of Township

12 north range 21 east but not depicted in --

Q. Time out. I think you missed a line or two. Could you being again?

A. If a dependent resurvey is made the possibility that a double set of corners was established along the northern Township boundary of Township 11 north range 21 east during the course of a subsequent survey in Township 12 north range 21 east should be addressed.

Q. Okay. Stop right there. Now, that's the survey they are talking about, the survey that Forsythe made in 1973; aren't they?

A. Yes.

Q. They are saying the possibility that there is a double set of corners up there should be addressed; isn't that correct?

A. That's correct.

Q. That was exactly your position in 1965; wasn't it?

A. Yes.

Q. Would you continue reading there.

A. The change in course of this boundary as depicted in the resurvey of Township 12 north range 21 east but did not depict (sic) in the survey of Township 11 north range 21 east is of concern.

Q. They are still talking about that 1973 survey on the Northern Township line?

A. Yes.

Q. Okay. Could you continue reading?

A. Any adjustment to the size of the sections in Township 11 north range 21 east should have been made in the northerly tier of sections --

Q. Stop right there. Isn't that what you assumed would have occurred in 1965?

A. Yes.

Q. Okay. Continue reading?

A. Thus making section 9 a full 640 acre section.

Q. Isn't that just what you assumed in

1965?

A. That's right.

Q. Okay. Continue.

A. If proportionate measurement* is used to set the corner common to sections 4, 5, 8 and 9, care should be exercised to determine if the corner can more readily -- can be more readily determined using reliable topographical or other evidence set forth in the 1881 field notes. (Asterisk added)

Q. Stop right there. Isn't that exactly what you did in 1965?

A. Yes, sir.

Q. Okay. Continue.

A. Rather than the corner common to section 4 and 5 Township 11 north range 21 east and section 32 and 33 Township 12 north range 21 east which was reestablished in the 1973 resurvey of Township 12 north range 21 east.

Q. Isn't that corner the northwest corner of 4?

A. Yes.

Q. Isn't that the corner that you indicated you couldn't use in 1965 because there were too many discrepancies up there?

A. That's right.

Q. The Judge here is saying don't use that corner if you can avoid it, isn't he?

A. That's correct.

Q. That's exactly what you did in 1965; isn't it?

A. That's right."

Thus the panel judges, who's job it is to decide land survey cases, set forth assumptions and procedures to be followed by the BLM in the resurvey. These were the exact assumptions and procedures that Downer followed in 1965. Under these circumstances

it is impossible for Downer to be found negligent in the manner in which he conducted his 1965 survey. It is only when the IBLA lowers the standard to the substantial evidence test, a standard that did not exist for surveys in 1965, that the 1982 BLM survey is given any credibility at all.

XIII

DOWNER OWES NO DUTY TO SUBSEQUENT PURCHASERS

Assuming arguendo plaintiff's negligence theory has some merit, the plaintiffs must prove that there is a duty owing from the Defendant Downer to the plaintiffs. The only duty assumed by Downer was that duty pursuant to the oral contract for work entered into and completed in 1966. Any duties thereunder are extinguished by the running of the statute of limitations under the contract. After 1970, Downer owes no duty to any person under this contract.

The existence of a duty to a particular person is a question of law:

> "The determination of any question of duty-that is, whether the defendant stands in such relation to the plaintiff that the law will impose upon him an obligation of reasonable conduct of the plaintiff-has been held to be an issue of law for the court rather than for the jury, to be determined by reference to the body of statutes, rules, principles and procedures which make up the law." 57A Am. Jur. 2d, Negligence, §86.

> "In fixing the bounds of duty, not only logic and science but also policy play an important role, for, as it has been said, the imposition of a duty is an exercise of judicial policy making. A line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit." Id. § 87

Downer did his work for Jacobsen who then sold the property. Negligence will not lie in this situation.

> "But no duty of care arises from a vendor-vendee relationship." Weggen v. Elenn-Parker Elec. Co., (SD Iowa) 510 F Supp 252.

If Jacobsen owes no duty of care to the vendees, then neither does Downer.

> "Traditionally, the general rule has been that no cause of action in tort can arise from the breach of a duty existing by virtue of contract unless there is between the defendant and the person injured what is termed 'privity of contract.'" 57 Am. Jur. 2d, Negligence, §122.

Admittedly, this general rule has decreased in effect in recent years. However, in like situations and after the passage of a number of years, liability has been terminated.

Recovery for improvements to real property is limited to, at the most, twelve (12) years after

construction, with or without privity of contract. If this survey is considered to be a construction of improvement to real property, the longest time that Downer could be liable under any theory is twelve (12) years. See Nevada Revised Statutes 11.203, 11.204 and 11.205.

XIV

ASSUMING ARGUENDO THAT DOWNER IS FOUND TO OWE A DUTY TO SUBSEQUENT PURCHASERS, HE SHOULD BE LIABLE ONLY FOR THE PURCHASE OF A VACANT LOT WITHOUT IMPROVEMENTS

The value of post purchase improvements are not an element of recoverable damages in contract. See Clark v. Sypress Sures Development Co., 516 So.2d 622 (ALA. 1988) dealing with a purchasers actions for breach of contract and breach of warranty respecting real property.

> "A vendor is not presumed to contract in reference to any future condition of the estate which he sells.... Nor can he be understood as contracting for a liability to pay for improvements which rest with the discretion or caprice or folly of the buyer." Id. at 629.

Downer submits that the above statement of the law should be applicable to this situation. Downer surveyed on a vacant piece of property. His damages,

if any, should be limited to the price of that property immediately post survey.

XV

FAILURE TO JOIN IN THE FEDERAL LAWSUIT PRECLUDES RECOVERY

All parties to this lawsuit, except Downer, had the ability to pursue the appeal of the IBLA determination (ROA Ex.F p5). None did.

> "The doctrine of avoidable consequences applies to injuries to property. A person whose property is damaged can recover only those damages that would have been sustained if he exercised such care as a reasonably prudent person would under the like circumstances to minimize the damage. The law will not allow one to sit idly by and see his property damaged or destroyed through forces negligently set in motion by another and then collect damages occasioned by his own failure to make reasonable exertion to arrest such damage or destruction." 22 Am. Jur. 2d, Damages § 544.

The refusal of any other party to pursue the appeal in federal court is a superseding intervening cause that cuts of liability for Downer's alleged negligent conduct.

XVI

AT THE SUMMARY JUDGMENT STAGE, NO PARTY OFFERED ANY EXPERT EVIDENCE THAT DOWNER'S ACTIONS FELL BELOW THE APPLICABLE STANDARD OF CARE

On October 18, 1991 Downer submitted a Motion

for Summary Judgment (ROA V3 p555) and Reply (ROA V3 p616) based, in part, on the claim that he was non-negligent. This was not opposed by any affidavit to the contrary.

> "Where motion for summary judgment of surveyor who was joined a third-party defendant in encroachment suit and alleged to have been negligent in making incorrect survey for defendants was supported by affidavit of one surveyor and affidavit plus subsequent deposition of another surveyor which clearly refuted such negligence by third-party defendant, absent showing by defendants indication that the survey was incorrect and resulted from negligence, they have failed to sustain their burden to prevent summary judgment of showing existence of material fact for trial." Palivoda v. Bruette, 250 A.2d 808.

Therefore, Downer's Motion for Summary Judgment should have been granted as a matter of law.

CONCLUSION

For the above reasons, the Judgment below should be reversed.

DATED this 20th day of November, 1992.

Respectfully submitted,

THE LAW OFFICES OF DANIEL R. WALSH

By /s/ Jon M. Yaple

JON M. YAPLE